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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 89

AUTOMATIC CANTEEN COMPANY OF AMERICA,
Petitioner,

vs.

FEDERAL TRADE COMMISSION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR PETITIONER

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BRIEF FOR PETITIONER

Introduction

This is a case of first impression. From the standpoint of impact on our competitive system and the number of persons and firms affected, it presents one of the most important trade regulation cases ever to come before this Court. The issue is whether the Federal Trade Commission

and the Court of Appeals for the Seventh Circuit were correct in interpreting section 2(f) of the Clayton Act, as amended by the Robinson-Patman Act,¹ as placing upon the buyer of commodities the burden of proving the sellers' cost justifications for lower prices received by the buyer; and if so, whether such a construction denies due process.

Although section 2(f) was enacted over sixteen years ago, the opinion below is the first judicial examination and interpretation of its meaning.

Section 2(f) makes it unlawful for a buyer "knowingly to induce or receive a discrimination in price which is prohibited by this section". The proper interpretation of these few words when read together with other portions of the act is of great importance to the business life of this country and, if wrongly construed, so as to destroy the normal bargaining process between buyer and seller, will have a revolutionary impact on our economy.

The seller who grants price differentials is required under the act to justify them by showing corresponding differences in manufacturing or distribution expense. This has long been recognized, but it was not believed that the buyer was required to make a similar showing. The court below, by placing precisely the same burden on both buyers and sellers, has created an untenable and impossible situation, that is, one where purchasers can no longer seek or receive lower prices unless they first produce cost studies from the reaches of the sellers' books, records and differing functional methods of operation.

Opinions Below

The opinion of the Court of Appeals (R. 506) is reported at 194 F. 2d 433. A supplemental opinion denying petition

for rehearing and motion for leave to adduce additional evidence (R. 534) is reported at 194 F. 2d 439.

Jurisdiction

The final decree of the Court of Appeals was entered on March 10, 1952 (R. 538). The petition for a writ of certiorari was filed on May 29, 1952, and granted on October 13, 1952 (R. 544). The jurisdiction of this Court is conferred by 28 U.S.C. 1254(1).

Questions Presented ²

1. Whether, in a proceeding against a buyer under section 2(f) of the Robinson-Patman Act, the procedural or *prima facie* provisions of sections 2(a) and 2(b) of said act ³ apply to the buyer, that is, in such manner as to shift to the buyer the burden of showing the sellers' cost justifications.

2. If so, whether such a construction constitutes a denial of due process in violation of the Fifth Amendment to the Constitution of the United States—

(a) because there is no rational connection between the proven fact of knowing receipt of price differences and the double presumption that such differentials are (1) unlawful, and (2) that petitioner knew this fact; or

(b) because such presumptions amount to conclusive presumptions, in that, petitioner is precluded from the right to present his defense to the main facts presumed, facts which are not in his possession or control but are hidden within the books, records and functional methods of 80 to 115 third party manufacturers.⁴

² The questions under this heading include Petitioner's specification of errors.

³ Act of June 19, 1936, 49 Stat. 1526, 15 U.S.C. 13(a) and (b).

⁴ The collateral question—Whether the Court of Appeals erred in holding that the present record fails to disclose that proof of the sellers' cost justifications "is not available, or is impossible"—is considered under this

3. Whether the Court of Appeals erred in granting the cross-petition of the Federal Trade Commission for enforcement of its order.⁵

If this Court should hold against petitioner on questions 1 and 2, additional questions are:

4. Whether the court below should have granted petitioner's motion for leave to adduce additional evidence to show that it was impossible for it to prove the sellers' cost justifications (R. 534-535).

5. Whether this Court should remand the case for failure of the Federal Trade Commission to consider workable alternative methods of administering section 2(f) of the Robinson-Patman Act in harmony with its Congressional objectives and the general anti-trust public policy of the United States of maintaining competition.

Statutes Involved

The pertinent provisions of section 2 of the Clayton Act, as amended by the Robinson-Patman Act (Act of June 19, 1936, 49 Stat. 1526, 15 U. S. C. 13), are as follows:

Sec: 2(a). That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale, within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimina-

⁵ On this question there is a direct conflict between the Court of Appeals in this case and the United States Supreme Court in the later case of *Rubercoid Co. v. Federal Trade Commission*, May 26, 1952, 96 L. ed. 732, 738-739.

tion may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: Provided, that nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: . . .

Sec. 2(b). Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: Provided, however, That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor . . .

Sec. 2(f). That it shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section.

STATEMENT

Nature of the Case

The review sought and granted in this case is limited to that portion of the judgment of the Court of Appeals for the Seventh Circuit which affirmed an order of the Federal Trade Commission directing petitioner to cease and desist from violating section 2(f) of the Robinson-Patman Act. Petitioner, the Automatic Canteen Company of America,

is engaged in the development and leasing of automatic vending machines (called "Canteens"), and in the business of purchasing candy, gum and nuts from the producers thereof and in the resale of these products to its franchise distributors. These Canteen distributors in turn resell the same merchandise to the public by means of vending machines leased from petitioner and located for the most part in factories and industrial establishments (R. 475).

The Federal Trade Commission, on March 19, 1943, issued its complaint against petitioner in two counts. Count I charged that certain conditions contained in the Distributor's Lease and Agreement were violative of section 3 of the Clayton Act⁶ (R. 3-7). This phase of the case is not before this Court. Count II charged that petitioner, as a buyer of candy, gum and nuts, knowingly induced and received discriminatory prices in violation of subsection (f) of section 2 of the Clayton Act, as amended by the Robinson-Patman Act.⁷

Extended hearings were held before a trial examiner in the course of which 7300 pages of testimony and hundreds of exhibits were adduced on behalf of the Commission. After the Commission had closed its testimony, petitioner filed a motion to dismiss upon the following ground (R. 14-15):

Counsel for the Commission have not proved a *prima facie* case in violation of the Robinson-Patman Act in that they have not proved, nor have they attempted to prove, that respondent, who was the purchaser, "knowingly induced or received" price differentials which made *more* "than due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities" in which the commodities involved were to such purchaser sold or delivered.

⁶ Act of October 15, 1914, 38 Stat. 719, 15 U.S.C. 14.

⁷ 15 U.S.C. 13(f).

The motion to dismiss was denied by the Commission on January 6, 1948 (R. 15-17).

Petitioner stood on its motion and did not submit evidence or testimony other than on cross-examination.

On June 6, 1950 the Commission issued its findings of facts (R. 473-493), its conclusion upholding the complaint (R. 493-494), its order to cease and desist (R. 494-497), and an opinion (R. 497-504).

The evidence before the Commission showed that petitioner received price differentials from approximately 80 of its 115 suppliers (R. 485); that these differentials resulted from negotiations in which petitioner brought to the attention of its suppliers certain economies created by its methods of doing business and asked them to pass such savings on to petitioner by way of a lower price (R. 362-365, 388-389). All of the suppliers who were queried on the subject testified there were savings in expense in serving Automatic Capteen Company naming such categories of savings as packaging, freight, selling expense, no free goods, no credit loss, no returns, etc. (R. 51-52, 54, 63, 64, 66, 67, 80, 84-85, 87, 96, 101, 110, 148-149, 151-152, 163, 164, 201, 206, 209, 215-216, 221, 240-241, 244, 258-260, 266, 268-269, 276, 285-286, 299, 301-302, 310).

On these facts the Commission took the view that a *prima facie* case was made and thereupon found that petitioner knowingly induced and received discriminations in price in violation of 2(f) (R. 494). The Commission said that the mere receipt or inducement of lower prices established a *prima facie* case against the buyer and that the burden of justifying such differentials on the basis of the sellers' differences in cost then shifted to the buyer, i.e., that the provisions of 2(a) and 2(b) relating to *prima facie* proof apply to the buyer as well as to the seller (R. 503-504).

Petitioner contended that the *prima facie* provisions of the act apply to sellers only; that they were not meant to

apply, and produced an absurd result if applied, in a case against the buyer under 2(f). It contended that if such provisions do apply they amount to a legislative presumption constituting a denial of due process; in that, there is no rational connection between the fact proved, i.e., price differences, and the ultimate facts presumed, viz., differences which actually exceeded the sellers' cost differences and knowledge of such excess on the part of the buyer. Petitioner also contended that the Commission's construction of the statute precluded petitioner from the right to make its defense because it was obviously not feasible for a buyer to go forward with cost justification evidence hidden within the reaches of the accounting books and records and the differing methods of operation of 80 to 115 third-party suppliers of candy bars, nuts and chewing gum.

The Court of Appeals, in affirming the portion of the order under review, said that when subsections (a), (b) and (f) of section 2 of the act are read together there is "no basis in the language of the three subsections for a distinction in their scope as between buyers and sellers" and that the act "places precisely the same burden of proving cost justification upon the buyer" as it does upon the seller (R. 522-523).

With respect to due process the opinion of the Court of Appeals (1) ignored petitioner's argument regarding legislative presumptions, and (2) held it was foreclosed from asserting it was impossible for a buyer to produce the sellers' cost justifications because petitioner had failed to lay a proper evidentiary foundation for such assertion (R. 523).

Petitioner filed a petition for rehearing (R. 525) and a motion for leave to adduce additional evidence under section 11 of the Clayton Act (R. 534), both of which were

denied by the Court of Appeals on March 3, 1952 (R. 536).

The facts are developed more fully in the course of the argument.

The Importance of the Case

The Commission's order, affirmed by the Court of Appeals, cuts deeply into the traditional bargaining process between buyers and sellers. It confronts every buyer in interstate commerce with the peril that if, for goods of like grade and quality, he accepts a lower price, he must be prepared to prove that the seller's differential price was cost justified.

The basic issue is whether the American buyer—be he a retailer, wholesaler, or manufacturer—is to be deprived of the time-honored opportunity to bargain over prices.

Under the Commission's order subsection (f) would attach to every buyer in interstate commerce:

where the seller is competing with any other seller for respondent's [the buyer's] business, or where respondent [the buyer] is competing with other customers of the seller (R. 496).

As stated by the Amicus below, "Seklom has an appeal from a Federal Trade Commission order involved more universal and important business consequences that transcend the interest of any individual respondent in a particular Commission proceeding. . . . It would be difficult to examine any aspect of daily business or trade without finding that the rule the court is here considering would have an immediate and comprehensive impact."⁹

The job of buying is vitally important to the success of any enterprise whether it be a manufacturing establishment, a distributor, a department store, or a corner grocery. Everything manufactured reflects in some measure the

⁹ Brief of Atlas Supply Co., Amicus Curiae, pp. 1-3.

fabrication of purchased raw materials and the assembly of purchased components.

The industrial purchasing function has been described by one authority as follows:

Purchasing has emerged as a vital and constructive force in management, an essential factor in setting and carrying out company policies, the determining factor in production quotas and accomplishments, the most potent means of achieving economically sound product cost and maintaining a favorable competitive and profit position, a constructive element in public relations, and with economic implications that reach and affect every sector of the national industrial community.¹⁰

A metropolitan department store in New York, Chicago or Los Angeles buys thousands of separate consumer items for resale, ranging from such durable goods as refrigerators to such fragile objet d'art as fine porcelains and delicate blown glass.

The small business man,—the wholesaler, the retailer, the grocer, the variety store—is in the aggregate the greatest purchaser of all both in number and dollar volume. For hundreds of years he has sought to persuade sellers to reduce prices. This effort to buy cheaply has always been considered beneficial to our economy. It is in fact an essential feature of price competition.

The interpretation upon which the Commission's order is based distorts the ancient principle of the Anglo-American common law and our own statutory system that the bargaining process inherently involves a buyer who seeks to buy as cheaply as possible. Section 2(f) of the Robinson-Patman Act limits this freedom of higgling over the price to the extent of preventing unlawful discrimination resulting from the knowing receipt by a buyer of differential prices which reflect more than cost savings.

¹⁰ Stuart F. Heinritz, Editor of "Purchasing," July, 1948, p. 97.

On that proposition there is no dispute in this case. What is in controversy is an interpretation of section 2(f) which imputes to the Congress an intent to create for the buyer the hazard that he is inducing and receiving a lower price which he cannot cost justify because the data essential to such justification is in the exclusive possession of the seller who grants the price differential. If the buyer must proceed at his own peril unless he can first prove that the seller's lower price is justified by differences in cost, then buyers generally cannot safely continue to bargain in the manner heretofore regarded as the essence of the bargaining process upon which a competitive system depends. The inevitable result for buyers in general would be to seek the legal shelter of a one-price basis as an escape from the legal fiction that the buyer is in as favorable a situation to prove the seller's cost justification as the seller himself.

This reversal of the traditional process of bargaining in commercial transactions presents a substantive and procedural due process issue under the Fifth Amendment. If the Commission and Court of Appeals are right in imputing to Congress an intention to place upon competition the clog that would necessarily result from requiring a buyer to prove the sellers' cost justification, then this Court should decide whether or not such Congressional intention is consistent with due process.

SUMMARY OF ARGUMENT

This is a case of first impression. It presents a question of statutory construction and a constitutional issue of due process under the Fifth Amendment of paramount importance. The issue is whether the Federal Trade Commission and the Court of Appeals for the Seventh Circuit were correct in interpreting section 2(f) of the Robinson-Patman Act as placing upon the buyer of commodities the burden of proving the sellers' cost justification for lower

prices received by the buyer; and if so, whether such a construction denies due process.

The Court below, by placing precisely the same burden on both buyers and sellers, has created an untenable and impossible situation, that is, one where purchasers can no longer seek or receive lower prices unless they first produce cost studies from the reaches of the sellers' books, records and differing functional methods of operation.

I

The construction of 2(f) by the Commission and the Court of Appeals is contrary to the basic philosophy of the act and our competitive system.

It is an obvious fact of business life that sellers will not ordinarily provide buyers with detailed knowledge of their business necessary to prove cost justification. Without such aid from the seller, a 2(f) charge under the theory of the Commission and court below is unanswerable by the buyer. "Thus, the result is tantamount to a *per se* violation rule . . . [It] converts the language of the act, which recognizes the validity of price differences based on cost savings, . . . into an elusive will-of-the-wisp."¹¹

The evidence in this case established one fact beyond all doubt—sellers realized savings in cost in selling to petitioner. In such a situation a buyer may, and in fact should, seek different prices for merchandise which involves differences in selling and delivery expense. But if sections 2(a) and 2(b) are made applicable to the buyer in the manner suggested by the court below it would outlaw such practice. It is no answer to say that it is merely *prima facie* illegal and the buyer has an opportunity to rebut it, because the buyer does not have access to rebutting evi-

¹¹ Oppenheim, 30 Mich. L. Rev. 1208, n. 180, June, 1952.

dence. He is not in a position to know when, how, or to what extent the sales to him may be in violation of the act because he cannot know the amount of cost savings realized by his vendors.

Section 2(f) makes it unlawful for buyers "knowingly to induce or receive a discrimination in price *which is prohibited by this section*" (emphasis supplied). This is the only prohibition in the section; there are no provisos or exceptions. Since 2(a) is the only subsection of section 2 which makes it unlawful for a seller "to discriminate in price," the phrase in 2(f) "discrimination in price which is prohibited by this section" necessarily refers to the one prohibited by 2(a).

Section 2(a) contains a general prohibition against price discrimination by a *seller*, followed by a proviso stating that cost justified differentials are not unlawful. This in turn is followed by section 2(b) which provides that the burden of showing justification shall shift to the alleged violator upon proof of a prima facie case of discrimination. Concededly, in a proceeding against a seller under 2(a), the seller has the burden of proof to show that he comes within this proviso.

But the present case involves a *buyer, not a seller*. What the buyer is prohibited from "knowingly" inducing or receiving by 2(f) is a price differential which he knows makes more than "due allowance" for differences in the seller's cost of manufacture, sale or delivery; for not until this is shown does the differential become a "discrimination in price which is prohibited by this section."

The court's interpretation of the word "knowingly" as used in 2(f) leaves the word without any meaning whatever. A buyer who obtains a lower price based on published quantity discounts or on the basis, as in this case, that he saves the seller distribution expense, knows automatically that

he is receiving a lower price. As Congress used it, the word "knowingly" means knowledge of receipt of a "prohibited" price, that is, "knowledge of the facts which, taken together, constitute the failure to comply with the statute." *St. Joseph Stockyards Co. v. United States*, 187 Fed. 104, 105.

The Commission and the court below relied on seller cases under 2(a).—The rationale of these seller cases clearly repudiates the contention that the buyer has the same burden of proof as the seller. Certainly it cannot be said as in the *Moss* case¹² that the buyer "sets two prices" and "knows why he has done so," or as in the *Morton Salt* case¹³ that the buyer "possesses all the data as to costs" of the seller.

The court below construed section 2(b) as applying to a case under 2(f) on the ground that 2(b) states that the burden of rebutting a *prima facie* case shall be "upon the person charged with violation" (R. 523). This construction disregards several factors.

In the first place, the "person" referred to is one charged with "discrimination in price" under 2(a) or discrimination in "services or facilities" furnished under 2(e), i.e., the seller. There is no reference to a buyer or to the knowing inducement or receipt of a price discrimination under 2(f).

Secondly, the meeting competition proviso of 2(b) states "nothing herein contained shall prevent a *seller* rebutting the *prima facie* case thus made by showing, . . ." (emphasis supplied). Clearly, the phrase "*prima facie* case thus made" refers back to the identical phrase contained in the first part of 2(b) with reference to the shifting of the burden of proof. By referring specifically in the meeting competition proviso to "a seller," Congress intended that

¹² *Samuel H. Moss, Inc. v. F.T.C.* (C.A. 2), 148 F. 2d 378, 379.

¹³ *F.T.C. v. Morton Salt Co.*, 334 U.S. 37, 60.

the first part of 2(b) as well as the second part should be applicable to sellers only. The omission of any reference to the buyer or to a prohibition against him in contrast to the specific reference to a seller and to seller prohibitions enforces the affirmative inference that that which was omitted must have been "intended to have opposite and contrary treatment."¹⁴

Thirdly, 2(b) authorizes the Commission to issue an order "terminating the discrimination." The buyer does not have it within his power to terminate the granting of a price discrimination because he is not the grantor in the first place. The buyer can only terminate "knowingly" inducing or receiving discriminations.

Finally, the non-application of 2(b) to a case under 2(f) is demonstrated by the chronological history of legislative events. Section 2(b) originated in the House and the House bill did not contain a buyer proscription.¹⁵ In fact section 2(f) appeared in neither the House nor the Senate bills as they were reported from committee but first appeared as a floor amendment to the Senate bill.¹⁶ The House bill never contained an equivalent of this subsection but in conference the House agreed to accept it.¹⁷

The Congressional sponsors clearly intended section 2(b) to apply to the seller alone. They said:

Where the information is peculiarly within the knowledge of the party, then the burden shifts to him.¹⁸

¹⁴The rule of *expressio unius est alterius* applies. See *Ford v. U.S.*, 273 U.S. 593, 611; 2 Sutherland (3d ed. Horack), *Statutory Construction*, (1943), pp. 412-414.

¹⁵H.R. 8412; H. Rep. 2287, 74th Cong. 2d Sess., pp. 1-2.

¹⁶80 Cong. Rec. p. 6666.

¹⁷H. Rep. No. 2951, 74th Cong. 2d Sess. p. 8.

¹⁸80 Cong. Rec. p. 8328.

Where for any reason, the evidence to prove a fact is chiefly, if not entirely, within the control of the party . . . then the burden of going forward . . . rests on him.¹⁹

The legislative history makes it clear that Congress intended in section 2(b) to do no more than make the common law principles as to burden of proof applicable to proceedings before the Federal Trade Commission.

II

The construction by the court below requiring a buyer to prove the sellers' cost justifications violates the Fifth Amendment.

The elements of a case under 2(f) are (1) inducement or receipt of an unlawful price differential, and (2) knowledge by the buyer that such price differential is unlawful. Since the only evidence introduced in this case to support a finding of price discrimination was that petitioner knowingly purchased goods at prices below the prices received by others (R. 484-486), the following presumptions must be made to find violation:

(1) It must be presumed that the differences in price were in fact unlawful differentials and hence discriminations.

(2) It must then be presumed that petitioner knew this fact, i.e., that the differences in price were not cost justified or were otherwise illegal.

This "prima facie" case (creating presumptions of fact thus shifting the burden of proof) must, in order to meet the constitutional requirement of due process, satisfy three tests:

First, there must be a rational connection between the facts proved and the ultimate facts presumed;

Second, a procedural device of this type must not operate to preclude petitioner from the right to present his defense; and

Third, buyers and sellers must not be placed in the same position procedurally where it results in arbitrary and unreasonable discrimination.

Obviously there is no rational connection in the instant case between the fact proved (price differences) and the facts presumed by the Commission and the court below, namely, price discrimination in excess of the sellers' cost differences and knowledge thereof on the part of the buyer. See *Tot v. United States*, 319 U. S. 463. Furthermore, in attempting to apply the *prima facie* provisions of the act to the buyer, the court below seeks to pyramid presumptions. This cannot be done. A presumption must be based upon facts proven by direct evidence and cannot be based upon nor inferred from another presumption. *Westland Oil Co. v. Firestone Tire & Rubber Co.*, 143 F. 2d 326, 330.

If the attempt made here to apply the *prima facie* provisions of the act to the buyer is sustained and the main facts are presumed, namely, that the differentials (1) were in excess of the savings and (2) petitioner knew it, petitioner could make no defense because it has no access to the books and records of its 80 to 115 suppliers. Such presumptions of fact, shifting the burden of proof, cannot thus operate against one who has neither possession nor control of the facts presumed.

The Court of Appeals erred in holding that the present record fails to disclose "impossibility of proof." To meet the Commission's case, that is, to justify the differentials, petitioner would be required to make cost justification from the books, records and methods of operation of 75 companies not parties to the litigation and against whom

petitioner has no power of compulsory subpoena or process. The court below should have taken judicial notice of the fact that such a feat is impossible.

It is common knowledge that to establish a cost justification which in fact exists takes much more than mere access by a buyer to the sellers' books and records—it takes the active cooperation of the seller in making time studies, estimates, allocations of cost and interpretations of records. Surely this Court, with its long familiarity with accounting problems, can take judicial notice of the fact that the science of distribution cost analysis, if one may call it a science, is not well established; that the distribution activities of practically every company differ from those of every other company; that it is necessary to survey all costs and all commodities of a company to ascertain the cost of serving a particular customer or selling a particular commodity; that the success of a study of this sort depends to a great extent on the self-interest of the people who furnish the information and that a seller is not at all likely to give the cooperation to a buyer which is essential in making such a study.

The construction of the act by the court below places buyers and sellers in the same position procedurally even though their positions are completely different. The seller has the knowledge and means to come forward with evidence as to cost justification; the buyer does not. A legislative discrimination so arbitrary and unjust violates the due process clause.

III

The Court of Appeals erred in granting the Federal Trade Commission's cross petition for enforcement. *Rubcroid Co. v. Federal Trade Commission*, May 26, 1952, 96 L. Ed. 732, 738-739 (Adv. Op.).

IV

Since the court below refused, on wholly technical and procedural grounds, to examine the constitutional question, a case of wide application was decided without consideration of important and possibly determinative issues. Without admitting that the record fails to disclose the impossibility of proof which petitioner put in issue below, it is nonetheless clear that petitioner was unduly prejudiced by reason of the failure to remand the case for a full determination of this question.

V

The Commission was under an affirmative duty to weigh alternative interpretations of the ambiguous words of the statute which would permit workable methods of administration and enforcement in harmony with the Congressional antitrust policy of maintaining competition. The interpretation of 2(f) by the Commission and the court below sacrifices the essentials of the bargaining process upon which the maintenance of effective competition depends; it will cut deeply into traditional bargaining relationships between buyer and seller in every industry and in every sales transaction. Where there is such a tremendous impact, the record should show that the Commission weighed alternatives and considered the effect of its findings on the competitive system. See *Eastern-Central Motor Carriers Assn. v. United States*, 321 U. S. 194, 209-212.

ARGUMENT

I

The Construction of 2(f) by the Court Below, Requiring a Buyer To Prove His Seller's Cost Justification, Is Clearly Erroneous.

The court below held that section 2(f) places precisely the same burden upon the buyer, as it places on the seller,

to prove cost justification once the Commission establishes knowing inducement or receipt of a price difference. Accordingly, this case presents the major question of whether in a proceeding against a buyer under 2(f) of the Robinson-Patman Act, the procedural or *prima facie* provisions of sections 2(a) and 2(b) of said act apply to the buyer as well as the seller, that is, in such manner as to shift to the buyer the burden of showing the sellers' cost justifications.

A. THE CONSTRUCTION OF THE COURT OF APPEALS IS CONTRARY TO THE BASIC PHILOSOPHY OF THE ACT AND OUR COMPETITIVE SYSTEM.

The construction of 2(f) by the Commission and the Court of Appeals in this case has been characterized as "untenable" and "unwarranted" by Professor Oppenheim, one of the leading authorities in the field of trade regulation and antitrust law. He said:

In construing the language of 2(f) as requiring a buyer to prove his seller's cost savings to justify a price differential he accepted from the seller, the case has introduced an entirely new note of uncertainty into all interstate sales. The Seventh Circuit affirmed the Commission's reading of section 2(f) together with 2(a) and 2(b) to incorporate the *prima facie* case of 2(b) into the provisions of 2(f). This unwarranted construction poses a serious threat to any buyer who accepts a price advantage offered by a seller in the belief that it is cost justified or otherwise permissible under one of the provisos of 2(a). It is an obvious fact of business life that sellers will not ordinarily provide buyers with the detailed knowledge of their business necessary to prove cost justification under the standards established for such proof by the Commission. Without such aid from the seller, a 2(f) charge under the theory of the Automatic Canteen case is virtually unanswerable by the buyer. Thus, the result is tantamount to a per se violation rule.

The result converts the language of the act which

recognizes the validity of price differences based on cost savings, the good faith meeting of competition, and other exceptions, into an elusive will-of-the-wisp. It is properly characterized by the words used by Justice Jackson in the *Morton Salt Case*: 'a word of promise to the ear to be broken to the hope.' *Federal Trade Commission v. Morton Salt Co.*, 334 U. S. 37 at 58, 68 S. Ct. 822 (1948).²⁰

The court below held in effect, citing the *Morton Salt* case (334 U. S. 37), that since the statute places the burden of proof as to cost justification on the seller, it necessarily follows that "precisely the same burden" rests on the buyer (R. 522). Such a mechanistic rationale is patently unsound; it applies a principle of law, reasoned and sound under one set of circumstances, to an entirely different set of circumstances without analysis as to the application of the rule in the latter situation. The result is unfair and oppressive, not only to the parties involved, but to all buyers and all future litigants under 2(f).

With buyers and sellers placed in the same procedural situation, it is only reasonable to assume that in the future, in order to avoid difficult and lengthy litigations arising in seller cases where cost justifications can be made, the Commission may resort to the easier method of proceeding primarily against buyers. As successive buyers are subjected to cease and desist orders like the one in this case, and as still others attempt to bring their policies into line with such orders, price competition on the basis of increased efficiency in distribution will disappear.

In its place will be a rigid price structure foreign to the philosophy of our competitive system and also contrary to the basic philosophy of the Robinson-Patman Act which was meant to preserve lower prices based on more efficient means of manufacture and distribution.

²⁰ 50 Mich. Law Rev. 1208, n. 180, June 1952.

This result is reached because the Commission's decision forecloses the petitioner from receiving admitted cost savings. The evidence in this case established one fact beyond all doubt—sellers realized savings in cost in selling to petitioner.²¹ However, as a practical matter, the order forbids any differential based on such cost savings inasmuch as it is physically and economically impossible for petitioner, the buyer, to present evidence as to the sellers' cost differences. The result is that petitioner cannot safely accept a lower price on any transaction if that price is known by petitioner to be lower than the price to another even though it is clear that sellers enjoy lower costs of manufacture, service, and delivery with respect to petitioner's purchases. This means that petitioner and the thousands of buyers affected by this decision must buy only at the highest price of any seller.

Thus, although the Robinson-Patman Act was designed to promote competition, not to shackle it, the result of the Commission's order and the opinion of the court below will be to weaken competition by making it impossible for buyers to accept price differences that are entirely legitimate because of undeniable cost savings.

The petitioner in this case operated differently from other types of candy purchasers. It did its buying on an f.o.b. factory basis instead of a delivered price basis (R. 35, 139-140). It purchased candy in the 100 count rough cartons instead of the usual expensive lithographed display boxes of 24 each (R. 34, 35). It dealt direct with the manufacturer's home office and generally there was no field selling expense (R. 34, 35). Petitioner discussed these and other possible savings with its suppliers and asked them to quote on that basis.

²¹ Supra, p. 7.

As stated by Congressman Utterbach in presenting the Conference Report on the Robinson-Patman bill to the House, "There is no limit to the phases of production, sale and distribution in which . . . improvements may be devised and economies of superior efficiency achieved, nor from which those economies when demonstrated may be expressed in price differentials in favor of the particular customers whose distinctive methods of purchase and delivery make them possible."²²

The legislative history of the act is replete with evidence of the intent of Congress to permit differentials that reflect cost differences "resulting from the differing methods or quantities in which . . . commodities are . . . sold or delivered."²³ The House Committee Report said: "Any physical economies that are to be found in mass buying and distribution, whether by corporate chain, voluntary chain, mail-order house, department store, or by the cooperative grouping of producers, wholesalers, retailers, or distributors—and whether those economies are from more orderly processes of manufacture, or from the elimination of unnecessary salesmen, unnecessary travel expense, unnecessary warehousing, unnecessary truck or other forms of delivery, or other causes—*none of them are in the remotest degree disturbed by this bill* . . ." (emphasis supplied).²⁴

They would indeed be disturbed—in fact they would be precluded altogether—if the buyer is prevented from bargaining with the seller. Since it was the purpose of the act to preserve differentials which reflected no more than

²² 80 Cong. Rec., p. 9559, June 15, 1926.

²³ The report of the Senate Committee on the Judiciary characterized the cost justification provision as "of greatest importance" stating that "it leaves trade and industry free from any restrictions or impediment to the adoption and use of more economic processes, and to the translation of appropriate shares of any savings so effected up and down the stream of distribution to the original producer and to the ultimate consumer . . ."

S. Rep. No. 1502, 74th Cong. 2d Sess., p. 5.

²⁴ H. Rep. 2287, 74th Cong. 2d Sess., p. 17.

the savings it is absurd, it seems to us, to urge that Congress intended (through subsections (a), (b) and (f)) to assert that where a buyer induced or received such a differential he thereby *prima facie* committed an illegal act. These subsections were not meant to destroy the time honored principles of bargaining and selling between buyer and seller. Moreover this is a natural economics law that is not subject to congressional or administrative repeal.

"[T]he positions of buyer and seller are by nature adverse."²⁵

"The seller of necessity seeks the highest price obtainable for his goods and under conditions of sale most favorable to himself. The buyer seeks to make his purchase at the lowest possible price and under conditions of sale most favorable to the buyer. It is elemental that the position of a seller and a buyer in the same transaction are at opposite poles. Their interests are fundamentally opposed to each other."²⁶

"Conflicting interests are always engaged when an attempt is made by buyers and sellers to arrive at a market price for commodities." *Great Atlantic & Pac. Tea Co. v. F. T. C.* (C. A. 3), 106 F. 2d 667, 674, cert. den: 308 U. S. 625.

And yet when the petitioner in this case sought to occupy its elemental and natural position as a buyer, and make the best deal it could within the limits of the act, the Commission and the court below insist it *prima facie* committed an illegal act.

The trouble is that this case, for 7,000 long pages was tried by counsel in support of the complaint upon the theory that there is something *ipso facto* iniquitous in price differentials. This is not so. "Differentials in prices jus-

²⁵ H. Rep. No. 2287, March 31, 1936, p. 15, in discussing the brokerage provision of the Robinson-Patman Bill.

²⁶ House Comm. Hearings on Robinson-Patman bills, Feb. 27, 1936, p. 512.

tified by differences in . . . costs . . . have not heretofore been considered as iniquitous, wrongful, or unfair, nor as having any tendency to destroy competition or to foster monopoly. In fact, such price differentials have been regarded as beneficial to the public and not harmful to anyone. . . . The effect upon competition of differences in prices honestly based on differences in selling costs is the normal and natural result of fair competition between merchants whose overhead expenses differ. This type of competition is to be encouraged in the public interest, rather than restrained." *Great Atl. & Pac. Tea Co. v. Ervin* (D.C. Minn.), 23 F. Supp. 70, 78.

The term discrimination is sometimes used in the neutral sense which makes it apply to any differential in price between two customers of the same vendor. For a buyer to seek such a discrimination never has been and indeed never could be contrary to law. "Discrimination in prices," says J. M. Clark in his *Studies in the Economics of Overhead Costs*, "has been an ever-present fact, and far from being a violation of any natural economic laws of competition it is one of the natural forms which competition takes" (p. 3). Some kind of discrimination (differential) is inevitable in business. If, for example, a seller were to charge equal prices to all customers, then it would be discriminating against those whose orders involve lower costs or smaller service. Consequently, as Clark remarks, discrimination in the broad sense "needs no elaborate explanation; rather when it is absent, its absence needs explaining" (p. 433).

When, therefore, the complaint of discrimination is raised in any other than a frivolous sense it must be on some ground other than the mere fact that different or unequal prices are charged to different customers.

The discrimination which is improper lies not merely in difference of price, but in differentials which are not

related to some inequality in cost or economic return in the two transactions. A difference in price reflecting such inequality is not undue discrimination simply because it may handicap the less favored buyer in competing with the other.

The conclusion follows that the buyer may, and in fact should, seek different prices for goods which involve differences in costs. But if sections 2(a) and 2(b) are made applicable to the buyer in the manner contended by the Commission and the court below it would outlaw such practice. It is no answer to say that it is merely *prima facie* illegal and the buyer has an opportunity to rebut it, because the buyer does not have access to rebutting evidence. He is not in a position to know when, how, or to what extent the sale to him may be in violation of the act because he cannot know the amount of cost savings realized by his vendors.

The buyer would thus be prevented from seeking to cut down distribution costs which, even back in 1936 when the Robinson-Patman Act was passed, amounted to about 50 percent of the dollar paid by the consumer over the counter.²⁷ While production costs have fallen in most every line this has not been accompanied by similar economy of distribution. On the contrary, distribution costs have increased. The costliness and wastefulness of our distribution systems are well known. Every advance in production efficiency makes the contrast more obvious.

And in no industry was the distribution system more archaic and wasteful than in the candy industry where the customary jobber method of distribution employed the services of three middlemen between the manufacturer and the consumer. The manufacturer sold to the jobber, the jobber

²⁷ Malcolm G. McNair, head of the Harvard Bureau of Business Research, Senate Committee Hearings on S. 4171, March 24-25, 1936, p. 3.

245 U. S. 559; *Chicago, M. & St. P. R. Co. v. Coogan*, 271 U. S. 472; *Manning v. John Hancock Mutual Life Ins Co.*, 100 U. S. 693.

The rule of rational connection between the facts proved and those presumed has been applied in all types of cases, including those involving trade regulation statutes. In *Great Atlantic & Pac. Tea Co. v. Errin*, 23 F. Supp. 70, 82 (D. Minn. 1938), the court held unconstitutional a provision of the Minnesota Unfair Trade Practices Act which provided that "Any sale made by the retail vendor at less than 10 percent above the manufacturer's published list price, less his published discounts . . . shall be *prima facie* evidence of a violation of this act".

In *McFarland v. Amer. Sugar Co.*, 241 U. S. 79, this Court had under consideration a statute of the State of Louisiana intended to prevent a monopoly in the sugar business. The statute provided, among other things, that "any person engaged in the business of refining sugar within this State who shall systematically pay in Louisiana a less price for sugar than he pays in any other state shall be *prima facie* presumed to be a party to a monopoly or combination or conspiracy in restraint of trade . . ." Mr. Justice Holmes, in delivering the opinion of the court, said (241 U. S. at 86-87): "As to the presumptions, of course the legislature may go a good way in raising one or in changing the burden of proof, but there are limits. It is essential that there shall be some rational connection between the fact proved and the ultimate fact presumed, and that the inference shall not be so unreasonable as to be a purely arbitrary mandate" . . . The presumption created here has no relation in experience to general facts."

The rule has also been applied in civil cases of various types. In *Western & A. R. Co. v. Henderson*, 279 U. S. 639, for example, this Court set aside a Georgia statute which created a rebuttable presumption of negligence against the

railroad company, when it is made to appear that injury or damage has occurred by reason of the operation of the locomotive and train of cars of a railway company. The Court said the presumption was arbitrary; that "the mere fact of collision furnishes no basis for any inference as to whether the accident was caused by negligence of the railway company . . . Reasoning does not lead from the occurrence back to its cause." (at pp. 642-643)⁴⁹

The court below in the present case cast "precisely the same burden on the buyer as on the seller," although the buyer does not have the rebutting evidence in his possession or control. In this connection, the case of *Morrison and Doi v. California*, 291 U. S. 82, is particularly pertinent. There the Court had under consideration a California statute which prohibited an alien, who was neither a citizen nor eligible for citizenship, from occupying land for agricultural purposes. The statute provided that where the state proved the occupation or use of the land by the defendant and the indictment alleged his alienage and ineligibility for citizenship, the burden of proving his citizenship or eligibility for citizenship should rest upon the defense.

Defendant Doi, alleged to be an alien, had occupied land under a lease from defendant Morrison, a citizen. Both were convicted of conspiracy to violate the law. This Court in reversing the California courts, made a clear distinction between the permissible burden of proof which might be cast on Doi, the alien, and Morrison, the citizen. It pointed out that in an earlier case,⁵⁰ it had held that the State could constitutionally throw upon a defendant the burden of proving citizenship where it had been proved that he is a member of a race ineligible for citizen-

⁴⁹ See also *Manly v. Georgia*, 279 U. S. 1, 5-6; *Bailey v. Alabama*, 219 U. S. 219, 238-239; *Luria v. United States*, 231 U. S. 9, 25-26.

⁵⁰ *Morrison v. California*; 288 U. S. 591.

sold to the wagon-jobber, the wagon-jobber sold to the retailer, and the retailer sold to the consumer.

The purpose of 2(f) is clearly set forth in the legislative history as follows: "The closing paragraph of the Clayton Act amendment . . . makes equally liable the person who knowingly induces or receives a discrimination in price prohibited by the amendment. This affords a valuable support to the manufacturer in his efforts to abide by the intent and purpose of the bill. It makes it easier for him to resist the demand for sacrificial price cuts coming from mass buyer customers, since it enables him *to charge them with knowledge* of the illegality of the discount, and equal liability for it, *by informing them that it is in excess of any differential which his difference in cost would justify as compared with his other customers.*" (Emphasis supplied).²⁸

There was no proof in this case that any seller told petitioner that the price differential granted it was in excess of the savings; there is, in fact, strong affirmative proof to the contrary (R. 454-462). And the law does not require petitioner to make a searching examination of all the books and records of the vendor for something to cast a suspicion on the legality of the price differential, *U. S. v. Detroit Timber & Lumber Co.*, 200 U. S. 321, 331-332.

B. SECTIONS 2(A) AND 2(F) PROHIBIT PLACING ON THE BUYER THE BURDEN OF PROVING SELLER'S COST JUSTIFICATION:

Section 2(f) makes it unlawful for buyers "knowingly to induce or receive a discrimination in price *which is prohibited by this section*" (emphasis supplied). This is the only prohibition in the section; there are no provisos or exceptions. Since 2(a) is the only subsection of section 2

²⁸ Mr. Utterbach in the House after submission of Conference Report, 80 Cong. Rec., p. 9561, June 15, 1936.

which makes it unlawful for a seller "to discriminate in price," the phrase in 2(f) "discrimination in price which is prohibited by this section" necessarily refers to the one prohibited by 2(a).

Section 2(a) contains a general prohibition against price discrimination by a *seller*, followed by a proviso stating that cost justified differentials are not unlawful. This in turn is followed by section 2(b), which provides that the burden of showing justification shall shift to the alleged violator upon proof of a *prima facie* case of discrimination. Concededly, in a proceeding against a seller under 2(a), the seller has the burden of proof to show that he comes within this proviso.

But the present case involves a *buyer*, not a seller. What the buyer is prohibited from "knowingly" inducing or receiving by 2(f) is a price differential which he knows makes more than "due allowance" for differences in the seller's cost of manufacture, sale, or delivery, for not until this is shown does the differential become a "discrimination in price which is prohibited by this section".

To interpret 2(f) otherwise would require a complete rewriting of the section to incorporate within it provisos operating as affirmative defenses. The provisos of section 2(a) specifically apply to sellers only. Any attempt to incorporate in 2(f) by judicial interpretation the provisos of 2(a) is not only contrary to the express language of section 2(f) but produces the absurd result of placing on the buyer the impossible task of proving the seller's cost justification. The mere fact that section 2(a) places the burden of proof on the seller with respect to certain exemptions does not *ipso facto* place upon the buyer in a 2(f) proceeding a similar burden. Had Congress meant to do so, it could easily have added exemptions or provisos to 2(f) specifically applicable to the buyer.

The court below therefore, in order to reach the result it did, was required to rewrite 2(f) in several particulars. It eliminated the phrase "prohibited by this section"; it read into 2(f) the cost justification proviso of 2(a) and the *prima facie* provisions of 2(b); and it interpreted the word "knowingly" to mean merely ~~that the buyer knew he was getting a~~ lower price.

This makes a vastly different statute from the one Congress wrote. A mere price differential was not "prohibited" by Congress, nor was a lower price which can be cost justified.

In the same manner the court's interpretation of the word "knowingly" clearly violates the intention of Congress—in fact, it leaves the word without any meaning whatever. A buyer who obtains a lower price based on published quantity discounts or on the basis, as in this case, that he saves the seller distribution expense, knows automatically that he is receiving a lower price. As Congress used it, the word "knowingly" means knowledge of receipt of a "prohibited" price, that is, "knowledge of the facts which, taken together, constitute the failure to comply with the statute". *St. Joseph Stockyards Co. v. U. S.*, 187 Fed. 104, 105.²⁹

²⁹ In fact, knowledge is the whole offense under subsection (f), for without knowledge there is no offense, and it is not merely knowledge of price differentials that is the offense but knowledge of a discrimination which is prohibited by subsection (a), i.e., one that reflects more than "differences in cost of manufacture, sale or delivery resulting from the differing methods or quantities in which such commodities are . . . sold or delivered".

And so, "justification" has a different meaning as applied to the offense of the seller from what it has as applied to the offense of the buyer. Clearly, under subsection (f) the buyer commits no offense merely in receiving the differential as the Commission and the court below seem to assume. Where the only act pointed to as having been committed by the buyer and proved by the government is that of receiving a lower price, no justification can be required for the simple reason that no offense has been committed.

It seems clear therefore that the rule of statutory construction that the burden of proof under a special exception rests upon the one who claims its benefit is not applicable in this case. The Commission and the court below, however, *relying on cases against sellers under section 2(a)*, contend to the contrary and hold that petitioner, the buyer, has the same burden of proof as a seller. The rationale of these seller cases under 2(a) repudiates this contention.

In *Samuel H. Moss, Inc. v. F.T.C.*, 148 F. 2d 378, 379 (C.A. 2d), a section 2(a) seller case, the court said that "Congress adopted the common device . . . of shifting the burden of proof to anyone who sets two prices, and who probably knows why he has done so, and what has been the result". Only the seller can set two prices and know why he has done so.

In the *Morton Salt* case (334 U. S. 37, 44-45), also a seller case, this Court said that the burden of proof was on the seller because the cost justification proviso of 2(a) was a special exception and because 2(b) "specifically imposes the burden of showing justification on one who is shown to have discriminated in prices". Only a seller can discriminate in price. Mr. Justice Jackson, although dissenting, concurred in the Court's holding regarding the seller's burden of proof. "I agree," he said, "that these facts warrant a *prima facie* inference of discrimination and sustain a finding of discrimination unless the company [the seller], which best knows why and how these discounts are arrived at and which possesses all the data as to costs, comes forward with a justification." 334 U. S. 37, 60.

The rationale of these cases fully supports petitioner. Certainly it cannot be said as in the *Moss* case that the *buyer* "sets two prices" and "knows why he has done so", or as in the *Morton Salt* case that the *buyer* "possesses all the data as to costs" of the seller.

F. APPLICATION OF 2(b) IS LIMITED TO SELLERS

A major prop in the reasoning of the Commission and the court below is Section 2(b) of the act which provides that the burden of showing cost justification shall shift to "the person charged" with a violation of the section. An analysis of 2(b) shows that it was meant to apply to sellers only and that the court below erred in holding that it applies also to buyers.

Section 2(b) provides:

Upon proof being made, at any hearing on a complaint under this section, that there has been

discrimination in price or services or facilities furnished,

the burden of rebutting

the prima facie case thus made

by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order *terminating the discrimination: Provided, however, That* nothing herein contained shall prevent a *seller* rebutting

the prima facie case thus made

by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor. (Emphasis added.)

The court below construed the foregoing as applying to a case under 2(f) on the ground that 2(b) states that the burden of rebutting a prima facie case shall be "upon the person charged with violation" (R. 523). This construction disregards several factors.

In the first place, the "person" referred to must be one charged with "discrimination in price" under 2(a) or discrimination in "services or facilities furnished" under

2(e), i. e., the seller. It necessarily follows, as stated by the Third Circuit in *Great Atlantic & Pacific Tea Co. v. F. T. C.*, 106 F. 2d 667, 677, cert. den. 308 U.S. 625, that the language of 2(b) "relates to proceedings brought pursuant to the provisions of paragraphs (a) and (e) but [is] not applicable to proceedings instituted under paragraphs (c) or (d)". Such a conclusion is required since subsections (c) and (d), like subsection (f), cover prohibitions not mentioned in 2(b). No more than 2(b) applies to 2(c) and 2(d) does it apply to 2(f). In this respect, the decision of the court below seems to be in conflict with the reasoning of the Third Circuit in *Great Atlantic & Pac. Tea Co. v. F. T. C.*, *supra*.

In order to apply 2(b) to a buyer under 2(f) it was necessary for the court below to rewrite the subsection and supply the following italicized language:

Upon proof being made . . . that there has been a discrimination in price or services or facilities furnished *or upon proof being made that there has been a knowing inducement or receipt of a discrimination in price*, the burden of rebutting, etc.³⁰

Secondly, the meeting competition proviso of 2(b) states, "nothing herein contained shall prevent a *seller* rebutting the *prima facie* case thus made by showing," (Emphasis supplied.) Clearly, the phrase "prima facie case thus made" refers back to the identical phrase contained in the first part of 2(b) with reference to the shifting of the burden of proof. By referring specifically in the meeting competition proviso to "a seller", Congress in-

³⁰ Section 2(b) as first reported by the House Judiciary Committee referred only to "discrimination in price"; then, by Committee amendment, it was enlarged to include discrimination in "services or facilities" (80 Cong. Rec. 8357). If Congress had intended to enlarge it still further to include a knowing inducement or receipt of a discrimination in price, under 2(f), it would have done so at the time by specific amendment.

tended that the first part of 2(b) as well as the second part should be applicable to sellers only.

The omission of any reference to the buyer or to a prohibition against him in contrast to the specific reference to a seller and to seller prohibitions enforces the affirmative inference that that which was omitted must have been "intended to have opposite and contrary treatment".³¹

Thirdly, 2(b) authorizes the Commission to issue an order "terminating the discrimination". The buyer does not have it within his power to terminate the granting of a price discrimination because he is not the grantor in the first place. The buyer can only terminate "knowingly" inducing or receiving discriminations.

Finally, the non-application of 2(b) to a case under 2(f) is demonstrated by the chronological history of legislative events. Section 2(b) originated in the House and the House bill did not contain a buyer proscription.³² In fact Section 2(f) appeared in neither the House nor the Senate bills as they were reported from committee but first appeared as a floor amendment to the Senate bill.³³ The House bill never contained an equivalent of this subsection but in conference the House agreed to accept it.³⁴

The holding of the court below that the language of 2(b), placing the burden of rebutting a *prima facie* case "upon the person charged with a violation of this section", encompasses buyers as well as sellers ignores this chronology. Section 2(b) could not have been meant to apply to buyers since the only "persons" subject to the act when 2(b) was drafted were sellers. Moreover, the word "seller" as used

³¹ The rule of *expressio unius est alterius exclusio* applies. See *Ford v. U.S.*, 273 U.S. 593, 611; 2 Sutherland (3d. Horack), Statutory Construction (1943), pp. 412-414.

³² H. R. 8442; H. Rep. 2287, 74th Cong. 2d Sess., pp. 1-2.

³³ 80 Cong. Rec. p. 6666.

³⁴ H. Rep. 2951, 74th Cong. 2d Sess. p. 8.

in 2(b) places a clear limitation on the more general term "person".³⁵

Such procedural devices as that set forth in 2(b) for shifting the burden of going forward with the evidence originate in and draw their reasoned strength from elementary common law principles. In upholding these provisions as applied to the *seller*, the courts have pointed out that he is the one who "sets two prices", "knows why he has done so", and "possesses all the data as to costs".³⁶

The Congressional sponsors intended Section 2(b) to apply to the seller alone. They said:

Where the information is peculiarly within the knowledge of the party, then the burden shifts to him.³⁷

* * * * *

Where for any reason, the evidence to prove a fact is chiefly, if not entirely within the control of the party . . . then the burden of going forward . . . rests on him.³⁸

The legislative history makes it clear that Congress intended in Section 2(b) to do no more than make the common law principles as to burden of proof applicable to proceedings before the Federal Trade Commission. Thus, Congressman Patman declared that "the matter of burden of proof" is "a restatement of existing law . . . It is the law of this land."³⁹ The "law of this land" which Con-

³⁵ The meaning of descriptive terms of general import such as "any person" must be derived from the "whole act", *U.S. v. Katz*, 271 U.S. 354, 363, and "general and specific words which are capable of analogous meaning, being associated together, take color from each other, so that the general words are restricted to a sense analogous to the less general", *U. S. v. Baumgartner*, 259 F. 722, 725.

³⁶ *Moss, Inc. v. F.T.C.*, (C.A. 2), 148 F. 2d 378, 379; *F.T.C. v. Morton Salt Co.*, 334 U.S. 37, 60.

³⁷ 80 Cong. Rec. p. 8328.

³⁸ 80 Cong. Rec. p. 8452.

³⁹ 80 Cong. Rec. p. 8442. See also Gilchrist, 80 Cong. Rec. p. 8452; Elwell, 80 Cong. Rec. p. 8328.

gressman Patman said Section 2(b) was intended to write into the act has never placed such an unfair and oppressive burden of proof on a defendant as the burden which the court below foists upon petitioner in ruling that the buyer must undertake the burden of proving the cost justifications of his various sellers.

Obviously, the buyer has no knowledge of the facts concerning the seller's cost justification in his possession nor does he have them within his control. Inherently, buyers and sellers are at opposite poles—they bargain at arm's length. If anyone knows whether or not a price granted is unlawful, it is the seller.

The court below ignored this clear Congressional intent to apply Section 2(b) to the seller alone. The court apparently took the position that the words of the statute are plain and require no recourse to the legislative history for clarification. The fallacy of this approach where the Robinson-Patman Act is concerned is readily apparent.⁴⁰

Inasmuch as this is the first 2(f) case to reach this Court, we have collected in Appendix A all of the relevant legislative history.

This Court has found it necessary to resort to the legislative history in deciding the various *Robinson-Patman Act* cases which have come before it. See, e. g., *Standard Oil Co. v. Federal Trade Commission*, 340 U. S. 231, at footnote 14. Legislative history was extensively relied upon by the Court

⁴⁰ See, e. g., *Rubercoid Co. v. Federal Trade Commission* (C.A. 2) 189 F. 2d 893, 894: "We sympathize with the petitioner's position and can realize the difficulties of conducting business under such general prohibitions. Nevertheless we are convinced that the cause of the trouble is the Act itself, which is vague and general in its wording and which cannot be translated with assurance into any detailed set of guiding yardsticks." See also Lindley, J. in *United States v. New York Great A. & P. Tea Co.*, 67 F. Supp. 626, 677 (E. D. Ill. 1948): "I doubt if any judge would assert that he knows exactly what does or does not amount to violation of the Robinson-Patman Act in any and all instances." Cf. *Minneapolis-Honeywell Regulator Co. v. Federal Trade Commission*, 191 F. 2d 786 (C.A. 7, 1951).

ing, packing and shipping . . . in the various price categories . . . was determined by a time study of the stockmen's picking operations, the packers' packing operations and the shipping clerks' shipping operations. . . . The time taken to pick, pack and ship each order was clocked to the nearest $1/12$ of one minute." Ibid. p. 19. From this study the average cost per minute and per order in each price category was determined.⁵⁷ I

It is obvious that a subpoena duces tecum directed to candy manufacturers on behalf of a buyer, even if allowed, would be ineffectual in obtaining analyses of the types described above. Moreover, a respondent in a Federal Trade Commission proceeding may be denied a subpoena to compel one not a party to the proceeding to produce confidential records. *E. B. Muller & Co. v. F.T.C.*, 142 F. 2d. 511, 520.

C. THE CONSTRUCTION BELOW RESULTS IN ARBITRARY AND UNREASONABLE DISCRIMINATION AGAINST BUYERS

The construction of the act by the court below places buyers and sellers in the same position procedurally even

⁵⁷ A similar analysis was made to find the cost per order invoice. This entailed a study of six operating divisions of three branch sales offices including all of the following expense items: Sales Ledger Bookkeepers Salaries, Remittance Clerks Salaries; Order Register Clerks Salaries; Billing Clerks Salaries; Extension Clerks Salaries; Cost Clerks Salaries; File Clerks Salaries; Mail Clerks Salaries; Sales Distribution Clerks Salaries; Statistical Clerks Salaries; Footwear Order Clerks Salaries; Footwear Stock Control Clerks Salaries; Stenographers and Typists Salaries; Operating Dept. Telephone and Telegraph Toll Expense; Tele-Operating Managers Salaries; Operating Dept. Traveling Expense Salaries; Operating Dept. Telephone and Telegraph Toll Expense; Telephone-Local Expense; Stationery and Printing Expense; Postage Expense; Packing and Shipping Supplies; Furniture and Fixtures—Repairs and Renewals; Depreciation of Furniture and Fixtures; Incidentals; Rent, Light, Water, Heat and Power—Office Expense; Credit Managers and Clerks Salaries; Credit Dept. Traveling Expense; Credit Dept. Commercial Agency Expense; Credit Dept. Legal and Collection Fees; Credit Dept. Telephone Toll Calls and Telegraph. 5 Dkt. 4972, Ex. I, pp. 32-36.

in the recent case of *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U. S. 384.

In the present case, the Court is dealing with a statute which is "inescapably ambiguous" (in the words of Mr. Justice Jackson, concurring with Mr. Justice Minton in the *Schwegmann* case) and the legislative history makes it plain that Congress intended only to restate the existing "law of the land" as to burden of proof⁴¹ and not to enact such an unusual, and unprecedented, procedural requirement as the one that a buyer who accepts a lower price from a seller does so in peril of being required at a later date to justify the seller's cost data—data which is necessarily in the possession of the seller, not the buyer.

We submit that the fundamental rules of fair procedure which place on the party who knows the facts the burden of going forward with the evidence, as developed by the courts⁴² and restated by Congress in 2(b), govern this case and require this Court to reject the construction of 2(f) by the court below.

II

The Construction by the Court Below Requiring a Buyer to Prove the Sellers' Cost Justifications Violates the Fifth Amendment.

We have shown in the foregoing pages that the construction of the act by the court below, placing the burden of

⁴¹ In Appendix B we have analyzed the rules of burden of proof as developed and applied by the courts. This analysis demonstrates that the compelling consideration causing the creation of presumptions (which shift the burden of going forward with the evidence) is that the facts are accessible to one of the parties but not to the other. This was the basis on which Congress rested section 2 (b) and the basis upon which the courts have justified placing the burden on sellers.

⁴² "Where a statute purports to restate the existing common law, the latter becomes an especially important factor in determining legislative intent." 3 Sutherland (3d. ed. Horack), *Statutory Construction* (1943) p. 7. "... treatment of statutes on procedure should be with reference to the previous common law in the federal courts." *Ibid.*, p. 12.

though their positions are completely different. The seller has the knowledge and means to come forward with evidence as to cost justification; the buyer does not. A legislative discrimination so arbitrary and injurious violates the due process clause of the Fifth Amendment.

In *Yu Cong Eng v. Trinidad*, 271 U. S. 500, the constitutionality of the so-called Chinese Bookkeeping Act was in issue. Under that act it was made unlawful for any merchant doing business in the Philippine Islands "to keep its account books in any language other than English, Spanish or any local dialect." Petitioner, on behalf of all Chinese merchants, contended that the act would deprive them "of their liberty and property without due process of law. . . ."

The evidence showed that Chinese merchants "could not comply with the act." As stated by the Court, there were 85,000 merchants in the Philippines to whom the law applied, 1200 of whom were Chinese; "comparatively few of the Chinese speak English or Spanish or the native dialects with any facility at all, and less are able to write or to read"; enforcement of the Act "would seriously embarrass all of them and would drive out of business a great number."

It was held that the impossibility of compliance by a particular class of merchants with a statute of general application to all merchants, was repugnant to the due process clause (271 U. S. 500, 524-525).⁵⁸

Thus a regulation valid "in given circumstances" may be invalid "under other circumstances" because it operates unreasonably. *Nebbia v. New York*, 291 U. S. 502, 525.

So it is in this case. Just as Chinese merchants were in a different position from others, so are buyers in a different position from sellers. It is lawful in many instances for buyers to accept lower prices, and to force them to justify

⁵⁸ See also *Morrison and Doi v. California*, 291 U. S. 82, 93.

proving a seller's cost justification upon the buyer, is contrary to the language of the act, its legislative history, and the purpose of the act.

In addition, such a construction would render 2(f) unconstitutional as a denial of due process of law in violation of the Fifth Amendment.

The elements of a case under 2(f) are (1) inducement or receipt of an unlawful price differential, and (2) knowledge by the buyer that such price differential is unlawful. Since the only evidence introduced to support a finding of price discrimination was that petitioner knowingly purchased goods at prices below the prices received by others (R. 484-486), the following presumptions must be made to find violation:

(1) It must be presumed that the differences in price were in fact unlawful differentials and hence discriminations.⁴³

(2) It must then be presumed that petitioner knew this fact, i.e., that the differences in prices were not cost justified or were otherwise illegal.

This "prima facie" case (creating presumptions of fact thus shifting the burden of proof) must, in order to meet the constitutional requirement of due process, satisfy three tests:

First, it is unconstitutional to throw the burden of rebuttal upon a defendant unless there is some rational connection between the facts proved and the ultimate facts presumed;

⁴³ Differentials in price are not *per se* discriminations. "The Act," said the Supreme Court, "does not prohibit all . . . discounts . . . Congress refused to declare flatly that they are illegal. . . ." *Bruce's Juices, Inc. v. American Can Co.*, 339 U.S. 713, 715-716.

Secondly, it is unconstitutional to throw the burden of proof upon a defendant where such a procedural device is oppressive and unjust, precludes the petitioner from the right to present his defense, and creates in effect a conclusive presumption; and

Thirdly, it is unconstitutional to place buyers and sellers in the same position procedurally where it results in arbitrary and unreasonable discrimination.

A. THERE IS NO RATIONAL CONNECTION BETWEEN THE PROVEN FACT OF PRICE DIFFERENCES AND THE DOUBLE PRESUMPTION THAT SUCH DIFFERENTIALS WERE (1) UNLAWFUL, AND (2) THAT PETITIONER KNEW THIS FACT.

Statutes like the Robinson-Patman Act creating artificial presumptions of fact and making one fact *prima facie* evidence of another, are by no means new or even modern. Where they are reasonable and where there is a rational connection between the fact proved and the ultimate fact presumed, they have long been recognized and enforced by the courts.

On the other hand where they are unreasonable and arbitrary the courts have been quick to strike them down.⁴⁴

The function of such statutes has been said to be "to make it possible to convict where proof of guilt is lacking". *Pollock v. Williams*, 322 U. S. 4. In fact, of recent years there has been such a marked increase in the creation of this statutory device as to suggest not only a design to minimize the labor of investigators and prosecutors but a trend—supported by some judicial dictum that there are

⁴⁴ *Tot v. United States*, 319 U.S. 463; *State v. Kelly* (1944), 218 Minn. 247, 162 ALR 477, 15 N.W. (2d) 554; *Great Atlantic & Pac. Tea Co. v. Egan*, 23 F. Supp. 79; *Morrison v. California*, 291 U.S. 82; *McFarland v. Amer. Sugar Ref. Co.*, 241 U.S. 79; *Western & A. R. Co. v. Henderson*, 279 U.S. 639; *Monley v. Georgia*, 279 U.S. 1; *Bailey v. Alabama*, 219 U.S. 219.

no vested rights in rules of evidence—to consider the rights of individuals as secondary to the demands of society.⁴⁵

Statutes of this nature are of two general types: those creating conclusive presumptions of law or fact; and those creating rebuttable presumptions or “prima facie” proof such as section 2(b) of the Robinson-Patman Act as applied to a seller. Those of the first type have met the almost uniform fate of being declared unconstitutional, as denying due process of law.⁴⁶ Those of the second type have met a varying fate, some withstanding and others succumbing to attacks on diverse grounds. It would be redundant to undertake a complete review and analysis of the decisions passing upon the validity of such statutes in view of the many exhaustive opinions and commentaries which can be consulted for the purpose.⁴⁷

The test of rational connection in testing *prima facie* proof was first enunciated by this Court in 1910 in the case of *Mobile, J. & K. C. R. Co. v. Turnipseed*, 219 U. S. 35. Since then it has been applied many times, with varying results, in civil as well as criminal cases. The latest pronouncement on the subject is *Tot v. United States*, 319 U. S. 463. This decision laid down the clearest and best enunciation of the test of rational connection we have had so far and there can be but slight doubt that it will be quoted as the model formulation of the rule in many later cases just as the *Turnipseed* case has been quoted in countless cases during the last 35 years.

The Court in the *Tot* case had under consideration the validity of section 2(f) of the Federal Firearms Act, 15

⁴⁵ See Brosman, The Statutory Presumption, 5 Tulane L. Rev. 178; Chamberlain, Presumptions as First Aid to the District Attorney, 14 ABA Jour. 287; O'Toole, Artificial Presumptions in the Criminal Law, 11 St. John's L. Rev. 167.

⁴⁶ See 20 Am. Jr., Evidence, sec. 10.

⁴⁷ These are collected in annotations at 162 ALR 495, 86 ALR 179 and 51 ALR 1139.

U. S. C. sec. 902(f), which provided: "It shall be unlawful for any person who has been convicted of a crime of violence or is a fugitive from justice to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce, and the possession of a firearm or ammunition by any such person shall be presumptive evidence that such firearm or ammunition was shipped or transported or received, as the case may be, by any such person in violation of this Act."

The Government's evidence was limited to proof of Tot's prior conviction on an assault and battery charge, his plea to a burglary charge, and that in 1938 he was found in possession of a loaded automatic pistol.

The question up for decision was the power of Congress to create the presumption that "From the prisoner's prior conviction of a crime of violence and his present possession of a firearm or ammunition, it shall be presumed: (1) that the article was received by him in interstate or foreign commerce, and (2) that such receipt occurred subsequent to July 30, 1938, the effective date of the statute." 319 U. S. at 466.

In sustaining the contention that the statute failed to meet the tests of due process Mr. Justice Roberts, speaking for a unanimous court, said:

The rules of evidence . . . (are established not alone by the courts but by the legislature. The Congress has power to prescribe what evidence is to be received in the courts of the United States. The section under consideration is such legislation. But the due process clauses of the Fifth and Fourteenth Amendments set limits upon the power of Congress or that of a state legislature to make the proof of one fact or group of facts evidence of the existence of the ultimate fact on which guilt is predicated. . . . The government seems to argue that there are two alternative tests of the validity of a presumption created by statute. The first

is that there be a rational connection between the facts proved and the fact presumed; the second that of comparative convenience of producing evidence of the ultimate fact. We are of the opinion that these are not independent tests but that the first is controlling and the second but a corollary. Under our decisions, a statutory presumption cannot be sustained if there be no rational connection between the fact proved and the ultimate fact presumed, if the inference of the one from proof of the other is arbitrary because of a lack of connection between the two in common experience.⁴⁸

Obviously there is no rational connection in the instant case between the fact proved (price differences) and the facts presumed by the Commission and the court below, namely, price discrimination in excess of the sellers' cost differences and *knowledge thereof* on the part of the buyer.

Furthermore, in attempting to apply the prima facie provisions of the act to the buyer, the court below seeks to pyramid presumptions. It first presumes that the price differentials exceeded the cost differences. Based upon this first presumption it then presumes further or secondly that petitioner had knowledge of this fact. Presumptions cannot be pyramided. *Allen v. Trust Co. of Georgia*, 149 F. 2d 120; *Standard Accident Ins. Co. v. Nicholas*, 146 F. 2d 376. "A presumption must be based upon facts proven by direct evidence and cannot be based upon nor inferred from another presumption." *Westland Oil Co. v. Firestone Tire & Rubber Co.*, 143 F. 2d 326, 330. See also *Greer v. U. S.*,

⁴⁸ In a searching analysis of the *Tot* case (56 Harvard Law Rev. 1325), Professor Morgan said there was "ample justification" for the Supreme Court's holding, pointing out that "whether one fact forms a basis for a rational inference of another depends upon the relationship between them in human experience." The court may be convinced, he said, "that the legislature in a given case is not purporting to exercise a judgment as to the relationship in experience between two facts, but is using a formula expressing such relationship in order to accomplish quite another purpose. If so, then it may well ignore the expression and insist that, however desirable the purpose, it must not be accomplished by illegitimate means."

ship"; this holding, said the Court, was based upon the fact that defendant "could do this without trouble if his claim of citizenship was honest. The People, on the other hand, if forced to disprove his claim, would be relatively helpless." 291 U. S. 82, 87-88. But, said the Court, in this case the California courts "have cast the *same burden upon both* [Doi, who is alleged to be ineligible for citizenship, and Morrison, the citizen]; and both have been convicted"; plainly, "as to Morrison, an imputation of knowledge is a wholly arbitrary presumption . . ." 291 U. S. 82, 92.

The same vice inheres in the construction of the statute by the court below which cast "the same burden" upon both sellers and buyers. While that burden may be reasonable as to sellers, it is wholly arbitrary when applied to buyers.⁵¹

B. TO PLACE THE BURDEN OF COST JUSTIFICATION UPON A BUYER CREATES A CONCLUSIVE PRESUMPTION; PETITIONER IS PRECLUDED FROM THE RIGHT TO PRESENT HIS DEFENSE TO THE MAIN FACT PRESUMED.

While the test of comparative convenience of producing evidence was rejected as an independent test in the *Tot* case,⁵² it has been the subject of considerable discussion. 162 A. L. R. at p. 511. It has been applied only (a) where the defendant has more convenient access to the proof, and (b) where requiring him to go forward with such proof will not subject him to unfairness or hardship.

In the *Turnipseed* case the Court, after stating that the validity of a legislative presumption depends on a rational connection between the fact proved and the ultimate fact presumed, said (219 U. S. 35 at 43):

So, also, it must not, under guise of regulating the presentation of evidence, operate to preclude a party from the right to present his defense to the main fact presumed.

⁵¹ See also *infra*, pp. 52-54.

⁵² 319 U.S. 463, 466.

The foregoing quotation is directly in point. If the attempt made here to apply the *prima facie* provision of the act to the buyer is sustained and the main facts are presumed, namely, that the differentials (1) were in excess of the savings, and (2) petitioner knew it, petitioner could make no defense because it has no access to the books and records of its 80 to 115 suppliers.

Such presumptions of fact, shifting the burden of proof, cannot thus operate against one who has neither possession nor control of the facts presumed. In *Westland Oil Co. v. Firestone Tire & Rubber Co.*, 143 F. 2d 326, the plaintiff asked the court to shift the burden of proof on the basis of a presumption that Firestone, who rented a storage tank from plaintiff but left it under plaintiff's control, was negligent. The court said that "There is no direct evidence as to how the gasoline which overflowed from the storage tank became ignited . . . [P]roof of the fire cannot give rise to a presumption of negligence on the part of one [Firestone] who was neither in possession nor control of the instrumentality which produced the casualty" (p. 329). See also *Lynch v. Ninemire Packing Co.*, 63 Wash. 423, 115 P. 838; *Clark v. Detroit & M. Ry. Co.*, 197 Mich. 489, 163 N. W. 964.

In *Heiner v. Dunnan*, 285 U. S. 312, 329, this Court had under consideration a statute which provided that any transfer of property made within two years prior to death shall be deemed and held to have been made in contemplation of death. The Court held that the statute violated due process whether "treated as a rule of evidence or of substantive law." A statute, said the Court, "creating a presumption which operates to deny a fair opportunity to rebut it violates the due process clause."

The foundation upon which the above principles are predicated is common fairness, i.e., due process of law; but another basis for the rule against conclusive presumptions.

of fact is found in the inherent nature of the judicial process:

The judicial function under the Constitution is to apply the law in controverted cases; to apply the law necessarily involves the determination of the facts; to determine the facts necessarily involves the investigation of evidence as a basis for that determination. *To forbid investigation is to forbid the exercise of an indestructible judicial function.* IV Wigmore on Evidence (3d ed. 1940) pp. 715-716. (Emphasis added.)

Consequently, adds Dean Wigmore, “. . . a Legislature’s attempt to interfere with the Judiciary’s powers by forbidding investigation of facts, though declaring certain testimony or other evidential data to be conclusive, is invalid. In [this] class would belong statutes which, while plainly recognizing one fact as still dominant in the substantive law, and not desiring to change it, should make another fact conclusive proof of it.” Ibid at 720.

The Robinson-Patman Act plainly recognizes and preserves “one fact as still dominant in the substantive law,” namely, that price differences are not unlawful discriminations if cost-justified. But—and this is the error—the construction urged by the Court of Appeals would impute to the Congress an intent to “make another fact” (mere receipt of a price differential) conclusive proof of violation of the substantive law by denying to the courts their “indestructible judicial function” to ascertain the facts.

A statute compelling a party to produce proof not in his possession or control is surely subject to constitutional attack. However, the court below refused to pass on this important question, saying that petitioner had “laid no foundation for its assertion . . . that cost justification was impossible of proof by a buyer,” citing *Anniston Mfg. Co. v. Davis*, 301 U. S. 337, 352-53, and *Tennessee Consolidated Coal Co. v. Comm.*, 117 F. 2d 452 (R.

523). These cases are not in point. *There the petitioner was in full possession of all the facts but refused to put them in evidence.*

We think the Court of Appeals clearly erred in holding that the present record failed to disclose the "impossibility of proof". The Commission introduced records and summaries of records covering a ten year period showing the prices at which more than 75 manufacturers sold their candy, gum and nuts to petitioner and to others (R. 498). The volume sold to petitioner during this period covered hundreds of different types of candy bars and amounted to millions of dollars; the volume sold to others totaled several hundred millions of dollars (R. 484-486, 491). To meet this, petitioner, the buyer, would be required to make cost justifications for 750 years (10 years x 75 suppliers) from the books, records and operations of companies not parties to the litigation and against whom petitioner has no power of compulsory subpoena or process.

This Court should take judicial notice of the fact that such a feat is impossible. It is common knowledge, moreover, that distribution cost accounting is far from an exact science, that to establish a cost justification which in fact exists takes much more than mere access by a buyer to the seller's books and records—it takes the active cooperation of the seller in making time studies, estimates, allocations of cost and interpretation of records.⁵³ Obviously

⁵³The courts will take judicial notice of facts which are well and universally known without particular proof being adduced in regard to them, and also with reference to those dealings of the commercial world which are of like notoriety. *Schollenberger v. Pennsylvania*, 171 U.S. 1. See also *Minnesota v. Barber*, 136 U.S. 313, 321; *Phillips v. Detroit*, 111 U.S. 604, 606.

The category of matters of which courts will take judicial notice is not a closed one, and judicial notice may be taken of a new fact if it is sufficiently notorious. *Ohio Bell Telephone Co. v. Public Utilities Commission*, 391 U.S. 202.

these things can be done only by employees of the seller who are familiar with the seller's methods of operation.

"Detailed cost figures are among the most confidential of financial data, and the idea of submitting them to audit by the customer is contrary to all accepted rules of good business practice". Purchasing 361, Prentice Hall 1947.

It would seem to stretch credulity beyond reasonable limits to suggest, as the court below suggested, that there is no showing "on the record in this case" that proof by the buyer (of 80 to 115 sellers' cost differences) "is not available, or is impossible" (R. 523).

Surely this Court, with its long familiarity with accounting problems, can take judicial notice of the fact that the science of distribution cost analysis, if one may call it a science, it not well established; that while manufacturing cost determination has been reasonably well understood and recognized for many years, this has not been true in the distribution cost field; that the distribution activities of practically every company differ from those of every other company and what is suitable for one company in the way of distribution cost analysis might not fit the situation of another company; that it is necessary to survey all costs and all commodities of a company to ascertain the cost of serving a particular customer or selling a particular commodity; that the success of a study of this sort depends to a great extent on the self interest of the people who furnish the information and that a seller is not at all likely to give the cooperation to a buyer (a third party) which is essential in making such a study.⁵⁴

⁵⁴ In *Baltimore & O. C. Terminal R. Co. v. Becker Milling Machine Co.*, 272 Fed. 933, it was held that the court knows from common knowledge that the expenses of maintaining engineering and experimental departments in factories as well as the expenses of superintendence and all other proper items of overhead, must be apportioned to product and charged as parts of manufacturing cost.

In order to show the difficulties which confront a company (i.e. the seller) in making a distribution cost analysis, we attach as Appendix C excerpts from an article by William Edgar Thomas, Jr., entitled "Accounting as an Aid to Compliance With the Robinson-Patman Act."⁵⁵ The author, after pointing out that general accounting analyses made for management are unsuitable for the purpose of supporting price differentials under the Robinson-Patman Act (p. 6), says (pp. 7-9):

The accountant who must establish legal price differentials has a difficult task . . . [He] will find little help in a study of the few cases which have been settled . . . In any case, the accountant will include or exclude [item of] cost on the basis of his ability to demonstrate a causal relationship between the cost and the allocation unit which is the product-customer. At one extreme are costs which unquestionably may be included because they can be traced definitely to the product sold to the customer. An example would be freight-out. At the other extreme are costs which will probably be excluded . . . because of the difficulty or impossibility of . . . proving even an indirect relationship between the cost and the unit . . . Examples of this type are the cost of public relations work, and the directors' fees.

* * * * *

In analyzing distribution costs . . . the first step is . . . to define the functions and the sub-functions . . . The second step is to find the cost of carrying out each sub-function. This cost is the total of the portions

⁵⁵ An abstract of a thesis submitted in partial fulfillment of the requirements for the degree of Doctor of Philosophy in Accounting in the Graduate School of the University of Illinois, Urbana, Illinois, 1944.

of the primary costs which apply to the sub-function. . . . When the sub-function cost has been ascertained, the next step is to allocate that cost to the allocation unit, which is the product-customer. . . .

On a subject as complex as distribution, it is impossible to consider all possible cases which may require modifications of general statements. With this in mind, a list of distribution sub-functions are given (see chart, pages 16-22) with their bases of allocation to the allocation unit. The sub-function is listed first, next, the order of allocation (that is, whether the cost is allocated first to the customer and then to the product, or first to the product and then to the customer), then the basis for making the first allocation, and finally the basis for making the second allocation.

The chart referred to lists 27 separate items of expense, which range from such obscure items as sales costs (which vary with mileage, time spent in travel, time spent in selling) and invoice costs (which vary with the number of typed lines per invoice), to such clear-cut items as delivery expense.

The author distinguishes between attempts to justify price differentials which have already been given and the construction of new price schedules. Obviously the former is the more difficult because the cost allocations must be related back to the period in which the alleged discrimination took place. However, the latter seems complicated enough. In building up a new straight discount schedule, for example, the author suggests that the accountant should go through the following steps (p. 10):

- (1) a critical survey of all manufacturing and distribution costs, (2) the determination of costs which may be considered costs of manufacturing, selling, and

delivery within the meaning of the Robinson-Patman Act, (3) the determination of the proper basis (if one can be found) for allocating each cost to the allocation unit which is the customer-product, (4) a classification of customers, i.e., a definition of the class of customer which is to use the discount schedule, (5) the determination of the costs listed in number 2 which may be included in the scheduled computation when the class of customer is considered, (6) the allocation of the costs chosen in step number 5 to a cost for each order, then the study of the variations of each cost with variations in the quantity of goods ordered and delivered, (7) the fixing of the brackets at points of break in the total cost curve for increasing quantities of goods ordered and delivered, (8) the conversion of the cost differences between brackets to a percentage of the base selling price because price schedules are customarily set up as percentages of a list price.

In describing the construction of "functional" price schedules for different classes of customers,⁵⁶ the author refers to the "growing complexity of the system of distribution", and points out that the discount schedules must be based upon cost differences which vary with the functions performed (pp. 12-13).

In one typical Federal Trade Commission case a seller, in order to cost justify a price differential of 22 percent, found it necessary to make many studies to obtain cost accounting data which were not kept in the regular course of business. In the *Matter of United States Rubber Co.* Dkt. 4972, Ex. I, p. 13. For example, a time study was made to determine the cost of packing and shipping for customers in various price brackets. "The branch labor cost of pick-

⁵⁶ That is, classes of customers other than the "old classification of manufacturer, wholesaler, retailer and consumer."

such differentials in the same manner as sellers: is to impose an arbitrary requirement without regard to the different circumstances of the two classes. And just as the Book-keeping Act would be "oppressive and damaging" to Chinese merchants so would the imposition of the burden of cost justification be to buyers since they would be forced because of impossibility of proof to discontinue the making of lawful contracts. "The Legislature may not," said the court, "under the guise of protecting the public interest, arbitrarily interfere with private business or impose unusual and unnecessary restrictions upon lawful occupations." 271 U. S. 500, 526.

The purpose of the Robinson-Patman Act is to allow the granting or receiving of price differentials which make due allowance for cost differences. If a buyer is saddled with the impossible burden of showing his seller's costs, all differentials will be outlawed. Such a "dragnet" construction of the Act—spreading "an all-inclusive net for the feet of everybody upon the chance that, while the innocent will surely be entangled in its meshes, some wrongdoers also may be caught"—violates the due process clause. *Tyson & Brothers v. Banton*, 273 U. S. 418, 443; *Heiner v. Donnan*, 285 U. S. 312, 328; *Fairmont Creamery Co. v. Minnesota*, 274 U. S. 1, 8-9.

III

The Court of Appeals Erred in Granting the Federal Trade Commission's Cross Petition for Enforcement

Petitioner contended below, relying primarily on the case of *Ruberoid Co. v. Federal Trade Commission*, (C.A. 2), 191 F. 2d 294, that the Commission was not entitled to an enforcement order on cross petition in the absence of a showing that violation has occurred or is imminent. The court below conceded that the *Ruberoid* case supported

petitioner's contention in this respect but refused to follow it (R. 524).

Since the entry of the opinion and decree below this Court affirmed the *Ruberoid* case and explicitly held that proof of disobedience is a prerequisite to the judicial enforcement of a Federal Trade Commission order, in view of the clear language of section 11 of the Clayton Act (15 U.S.C. 21), May 26, 1952, 96 L. Ed. 732, 738-739 (Adv. op.).

IV

Since the Court Below Refused, on Procedural Grounds, to Examine the Constitutional Question, a Case of Wide Application Was Decided Without Consideration of Important and Possibly Determinative Issues..

Petitioner sought to adduce additional evidence to show that it was impossible for it to prove the sellers' cost justifications (R. 534).⁵⁹ On a narrow legal technicality, the court below denied petitioner's motion (R. 536). It held that the present record failed to show such "impossibility" of proof, while simultaneously denying the petitioner the right to enlarge the record to deal with the question.

At the very least, even if the Commission's interpretation of the statute should be sustained by this court, the substance of due process requires the Court to recognize that foreclosure of proof that it is impossible for a buyer to show a seller's cost justification makes historic business relationships between sellers and buyers depend for their legality upon a highly technical choice *in limine* of a statu-

⁵⁹ Petitioner filed a motion for leave to adduce additional evidence (R. 534) under section 11 of the Clayton Act (15 U.S.C. 21) which provides that "If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Commission . . . the court may order such additional evidence to be taken . . ."

tory construction, which even this Court may find extremely difficult to decide in the search for the Congressional intent.

Without admitting that the record fails to disclose the impossibility of proof which petitioner put in issue before the Commission and the reviewing court below, it is nevertheless clear that petitioner was unduly prejudiced by reason of the failure to remand the case to the Commission for a full determination of this question.

V

The Commission Was Under an Affirmative Duty to Weigh Alternative Interpretations of the Ambiguous Words of 2(f) Which Would Permit Workable Methods of Administration and Enforcement in Harmony With the Congressional Antitrust Policy of Maintaining Competition.

The Commission's interpretation of 2(f), affirmed by the court below, was made without record evidence that the Commission had given due consideration to alternative interpretations reconcilable with the antitrust policy of the Congress. This is more than a matter of mere administrative discretion. It goes to the essence of the Constitutional safeguards of due process because of the arbitrary and oppressive burden of proof petitioner, and buyers as a class, would be required to assume under the unreasonable interpretation here in issue.

Since the Commission's interpretation of 2(f) sacrifices the essentials of the bargaining process upon which the maintenance of effective competition depends, it should be set aside by this Court unless the Commission can show that such was the unmistakable and sole intention of the Congress.

In order to avoid the "untenable" and "unwarranted" construction by the Commission of 2(f) in this case, Pro-

Professor Oppenheim has suggested (50 Michigan Law Review 1208-1209) that the subsection

be revised by incorporating . . . a prohibition upon a buyer's knowing inducement or receipt of prohibited discriminations in price, subject to the limitation that the buyer shall not be required to prove his seller's cost justification. To enable cost justification to be brought into a proceeding in which a buyer is made a respondent, the revised 2(f) should also provide that in a proceeding against a buyer, the Commission shall be required to join as a party respondent, either the seller, if a single seller is involved, or, as is more likely to be the case, a representative group of sellers.

If a seller fails to appear and defend or fails to sustain the burden of proving cost justifications, then the buyer would be free from liability unless the Commission further shows that the buyer acted either with actual knowledge of lack of cost justification, or with knowledge of such circumstances as to make his inducement or receipt of differential prices amount to bad faith or collusive conduct with the seller. . . .

These suggestions are made because in every instance the buyer is charged with liability only when the Commission has evidence that the seller or sellers have probably granted unlawful discriminatory prices. As matters now stand, the Commission places an indefensible burden of proof upon the buyer when it proceeds against the buyer alone. The burden of proving cost justification should be placed upon the seller, since he is the only one who possesses the evidence relevant to that defense. Common sense and daily observation of business purchasing activities demonstrate that buyers generally do not have the means of proving sellers' cost justifications.

The foregoing suggestions would constitute statutory recognition of the traditional "hard bargaining" process by which the buyer is entitled to procure the cheapest price consistent with savings arising from economy and efficiency. Buyer liability would arise only when there is knowing inducement or receipt by

the buyer of differential prices that amount to price discrimination because of lack of cost justification.

These valuable suggestions for a workable statute do not require Congressional revisions; they could just as readily be adopted by the Commission as alternative interpretations consistent with both the present language of 2(f) and the Congressional intent. It is apparent from a reading of Professor Oppenheim's article that he suggests statutory revision only because of the Commission's arbitrary interpretation in the instant case. After analyzing the position of the Commission and the court below, he said: "The result converts the language of the act, which recognizes the validity of price differences based on cost savings, the good faith meeting of competition, and other exceptions, into an elusive will-of-the-wisp." (50 Michigan Law Rev. 1208, Note 180).

Petitioner has already noted that the outcome of this proceeding will cut deeply into traditional bargaining relationships between buyer and seller in every industry and in every sales transaction. Where there is such a tremendous impact, the record should show that the Commission weighed alternatives and considered the effect of its findings on the competitive system.

The situation presented herein is analogous to that which this Court considered in *Eastern-Central Motor Carriers Assn. v. United States*, 321 U. S. 194. In that case, the Court rested its decision firmly upon an analysis of whether the Interstate Commerce Commission had determined motor-carrier rates in accordance with the standards set forth for its guidance in the National Transportation Policy.

A majority of the Court reversed the District Court principally upon the failure of the Interstate Commerce Commission to base its findings upon a record that would enable the Court to determine whether or not the Commis-

sion had given proper consideration to all factors involved in the application of the standards set forth in the statute. In the unsatisfactory state of the record, the Court insisted, it was impossible to perform its function as a reviewing tribunal "without further foundation" than was made. The case was remanded to the Commission in order that it might fill in the gaps left in the sketchy reports, with an accompanying disavowal that the Court had any purpose to instruct the Commission concerning the result it should reach:

In returning the case we emphasize that we do not question the Commission's authority to adopt and apply general policies appropriate to particular classes of cases, so long as they are consistent with the statutory standards which govern its action and are formulated not only after due consideration of the factors involved but with sufficient explication to enable the parties and ourselves to understand, with a fair degree of assurance, why the Commission acts as it does Observance of this requirement is as necessary when an established policy is being extended to new and significant situations as when a new policy is being formulated and applied in the first instance. We do not undertake to tell the Commission what it should do in this case. That is not our function. We only require that, whatever result be reached, enough be put of record to enable us to perform the limited task which is ours. (321 U. S. at pp. 211-212.)

In the case at bar, the Federal Trade Commission was dealing with a new policy formulated for the first time.⁶⁰

⁶⁰ The court below said that counsel had informed it that this was the first court test of a buyer's liability under section 2(f), and then added "although there have been numerous proceedings thereunder before the Commission" (R. 521). This incomplete statement leaves a misleading impression. In the eleven other cases in which the Commission has issued orders against buyers under 2(f), seven were uncontested proceedings (Nos. 3154, 3161, 3377, 3843, 5027, 5648, 5794), and the remaining four did not litigate the issues involved in the present review (Nos. 3820, 4548, 4957, 5771).

In such a case of first impression, when a question of public policy of such far-reaching importance is being decided, there is an inescapable duty resting upon the Commission to give "due consideration of the factors involved" and with "sufficient explication" to enable the courts to determine the basis on which the Commission acted.

Just as in the *Eastern Central* case the Court was dissatisfied with the failure of the Interstate Commerce Commission to measure up in that proceeding to its enlarged responsibilities under the Transportation Act of 1940, so here this Court should be equally concerned about the failure of the Federal Trade Commission to show awareness of its increased responsibilities as a regulator of forms of price competition never heretofore committed to its control.

CONCLUSION

It is undeniable that the word "discrimination" cannot be a talismanic word of illegal conduct by a mechanical and literal interpretation. The Commission and the courts have recognized in every Robinson-Patman Act proceeding that the term "discrimination" is *not* synonymous with a price differential.

Inequality is the essence of discrimination. As Mr. Justice Frankfurter pointed out in a different factual situation, but nevertheless by way of a situation applicable to this case, "The Procrustean bed is not a symbol of equality. It is no less inequality to have equality among unequals". *New York v. United States*, 331 U. S. 284, 353.

The bargaining process historically has recognized that unequals arise by reason of savings resulting from economy and efficiency imputable to the method or the quantity by which some purchasers buy as against less efficient and less economical methods by which other purchasers buy or take delivery.

In this case, the Commission and the Court of Appeals arbitrarily assumed that such differences must be cost justified by the buyer. In so ruling, both tribunals assumed that this is the one and only interpretation which conforms to the Congressional intent. If the ruling remains in effect, then the petitioner and all buyers similarly situated will be faced with a peril of being held in violation of the act *per se* whenever they knowingly accept prices lower than those of their competitors.

This case may seem to present the bare procedural question as to whether the burden of justification shifts to the buyer after the Commission has shown "knowing" receipt of a lower price. Technically that is the legal question posed by the case, but its answer raises broad substantive problems with major commercial, social and consumer implications.

The whole history and pattern of purchasing—whether the purchaser be the housewife, the lawyer buying law books, the small merchant acquiring goods in the market place, the relatively small interstate concern such as petitioner, or the very large manufacturing or distributing concern—demonstrate that all seek a lower price. The commercial buyer often advances reasons why he should receive a more attractive price—that is his job, and his whole training and competitive experience. Surely our trading system has not become so stagnant by virtue of the Robinson-Patman Act that the buyer must now say to the seller: "Are your prices too low?—Be sure now not to give me too good a price". That is precisely what the views of the Federal Trade Commission add up to in this case.

If the United States is to follow the road of certain other countries where the merchant is literally just a shopkeeper or a mere "stockist", with no virility in buying or selling, then Congress should say so in unmistakable statutory lan-

age. Certainly it turned no such sharp corner in its enactment of section 2(f) which was a Senate floor amendment adopted without debate or other serious legislative consideration.

For the above reasons it is respectfully submitted that judgment of the court below should be reversed.

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APPENDIX A

Legislative History Shows That Only Sellers Were Meant to Be Subjected to Burden of Proof as to Cost Justification.

Without resort to a "pick and choose" process, *all* of the pertinent legislative history supports the proposition that *only sellers* were meant to be subjected to the burden of proof as to cost justification.

1. Legislative history of 2(b).

Section 2(b) was in the original House Bill (H. R. 8442).⁶¹ Senator Moore offered it as a floor amendment to the Senate Bill (S. 3154), stating its purpose and effect as follows:

. . . : The amendment merely provides that if they [referring to sellers of milk] charge more to one person than to another, or are accused of discrimination, they shall have a right to prove justification . . .⁶²

In addition to stating that its application was to sellers, Senator Moore requested that the amendment be inserted immediately following section 2(a) which deals exclusively with discriminations in price by sellers.⁶³

The amendment, section 2(b), was agreed to without debate⁶⁴ and was not thereafter discussed in the Senate.

The uniform explanation as to the basis of the procedural rule 2(b) was as follows:

. . . where the information is peculiarly within the knowledge of the party, the burden shifts to him. . .⁶⁵

. . . where, for any reason, the evidence to prove a fact is chiefly, if not entirely, within the control of the

⁶¹ H. Rep. 2287, 74th Cong. 2d sess., p. 2.

⁶² 80 Cong. Rec. p. 6674.

⁶³ *Ibid.*

⁶⁴ *Ibid.*

⁶⁵ Congressman Ekwall, 80 Cong. Rec. p. 8328.

party then the burden of going forward . . . rests upon him⁶⁶

Such explanations could not and would not have been used if Congress had meant to apply 2(b) to the buyer. He has no "peculiar"⁶⁷ knowledge of the facts concerning the seller's costs nor does he have them within his control.

Moreover, if an intent to apply 2(b) to 2(f) existed there most surely would have been debate over such an unusual procedural enactment. Especially is this so since there was considerable debate regarding the procedural rule of 2(b) as applied to the seller.⁶⁸

Chronological developments in the drafting of section 2(b) also confirm that it was meant to apply to sellers only. As first reported 2(b) provided for the shifting of the burden of proof only when a *prima facie* case was made "that there has been discrimination in price."⁶⁹ Discrimination in price is a seller offense only.

Subsequently, upon recommendation of the House Judiciary Committee, 2(b) was amended to make it applicable to another seller offense, namely, discrimination in "services or facilities furnished" under Section 2(e).⁷⁰

Thus careful consideration was given to the naming of the offenses in section 2(b) to which that section would be applicable. Only two were named—both are seller offenses.

Congressman Utterback, in explaining the meaning of the due allowance proviso to the House gave many examples of situations in which differing methods of sale and delivery might result in cost savings. It is clear from the examples that justification by the seller only was contemplated.⁷¹

⁶⁶ Congressman Gilchrist, 80 Cong. Rec. p. 8452. See also, Congressman Patman, 80 Cong. Rec. 8442.

⁶⁷ "Peculiar" means "characteristic of one only"; "singular", "belonging to an individual", or "not common". Webster's Collegiate Dictionary (5th ed.).

⁶⁸ 80 Cong. Rec. 8328, 8441 and 8442.

⁶⁹ H. Rep. 2287, 74th Cong. 2d sess. p. 2.

⁷⁰ 80 Cong. Rec. 8357.

⁷¹ 80 Cong. Rec. 9417.

The Committee Report on the Senate bill (S. 3154), submitted by Senator Logan, discussed the "due allowance" proviso at some length. Explicit in this report is the understanding that the seller was setting two prices, that he would know why he did so, and thus be able to justify his action. It stated:

It is designed, in short, to leave the test of a permissible differential upon the question: If the more favored customer *were sold* in the same quantities and by the same methods of sale and delivery as the customer not so favored, how much more per unit would it actually *cost the seller to do so*, his other business remaining the same? (Emphasis added.)⁷²

The House Committee Report on Bill H. R. 8442 stated:

Section (c) [2(b) as enacted] down to the proviso merely lays down directions with reference to procedure including a statement with respect to burden of proof.⁷³

The section was characterized as an "added precautionary provision"⁷⁴. . . "relating to certain questions of procedure before the Federal Trade Commission."⁷⁵

The reason for the insertion of 2(b) was explained to the House by Congressman Utterback:

Owing to a body of court decisions to the effect that the legal rules of evidence do not in certain respects apply to hearings before administrative commissions, and to the uncertainty thus suggested, the bill contains a subsection stating the rule as to burden of proof, substantially as suggested above, as applicable to hearings before the Federal Trade Commission.⁷⁶

⁷² S. Rep. No. 1502, 74th Cong. 2d Sess. p. 6.

⁷³ H. Rep. 2287, 74th Cong. 2d Sess., p. 16.

⁷⁴ Ibid, p. 7.

⁷⁵ House Report 2951, 74th Cong. 2d Sess., p. 7.

⁷⁶ 80 Cong. Rec. 9418.

Its effect as understood by Congressional draftsmen was stated by Congressman Patman:

Now, with regard to the matter of burden of proof

Let me analyze that for you. What does that mean? It means exactly the rule of law today. It is a restatement of existing law. So far as I am concerned you can strike it out. It makes no difference. It is the law of this land exactly as it is written there. . . .⁷⁷

The Congressional understanding of the "existing law" which was being restated in section 2(b) was explained to the House by Congressman Gilchrist:

. . . We should distinguish between the duty of going forward with the evidence and the burden of proof. It is often wise to place the burden of producing evidence on the party best able to sustain it. It is very often held that where the party who does not have the original burden of proof, but who does possess positive and complete knowledge concerning the existence of facts which his opponent is called upon to negative; or, where, for any reason, the evidence to prove a fact is chiefly, if not entirely, within the control of the party who does not have the general or original burden of proof, then the burden of going forward with and producing this evidence rests upon him who does have the facts primarily and chiefly within his possession.⁷⁸

And Congressman Ekwall, in answer to Congressman Celler's argument that 2(b) was contrary to the rule of presumption of innocence, stated:

Does not the gentleman know that the rule he has stated is not the rule in this country; that where the information is peculiarly within the knowledge of the party, then the burden shifts to him to prove that fact?⁷⁹

⁷⁷ 80 Cong. Rec. p. 8442. Congressman Patman then illustrated the rule's application to a seller who "treated his customers unfairly".

⁷⁸ 80 Cong. Rec. p. 8452.

⁷⁹ 80 Cong. Rec. p. 8328.

From this legislative history it is clear that Congress intended in section 2(b) to do no more than make the common law principles as to burden of proof applicable in proceedings before the Federal Trade Commission.⁸⁰ Furthermore, it is clear that the legislative intent was to apply it to sellers only. Otherwise such explanations as to the basis of the rule, i.e., "where the information is peculiarly within the knowledge of the party then the burden shifts to him" and where "the evidence to prove a fact is chiefly, if not entirely, within the control of the party . . . then the burden of going forward . . . rests upon him," would have no application. The buyer has no "peculiar" knowledge of the facts concerning the seller's cost justification nor does he have them within his control.

The affirmative expressions of members of the legislature as to the application of 2(b) to sellers only, in contrast to the omission of any reference to its application to buyers either in debate or in committee reports, enforces the inference that Congress did not contemplate its application to buyers.⁸¹

2. *Legislative history of 2(f).*

The legislative history of 2(f) in no wise supports the view that the buyer has the burden of proving his seller's cost justification. Section 2(f) did not appear in either the Patman Bill or the Robinson Bill as reported by the respective committees.⁸² It was offered by Senator Copeland of New York as an amendment to the Robinson Bill:

Mr. Robinson: Mr. President, as I understand—and I inquire of the Senator from New York whether my understanding is correct—he has offered the amendment in the form in which it was submitted to me yesterday evening.

Mr. Copeland: Yes, sir; I have.

⁸⁰ We have found absolutely nothing in the legislative history to contradict this clear Congressional purpose and understanding.

⁸¹ *Ford v. U. S.*, 273 U.S. 593, 611.

⁸² H. Rep. 2287, 74th Cong. 2d Sess. and S. Rep. No. 1502, 74th Cong. 2d Sess.

Mr. Robinson: This amendment makes the person who knowingly receives an unfair, discriminatory price also liable; and I think it is sound in principle.

The Presiding Officer: The question is on agreeing to the amendment offered by the Senator from New York to the amendment of the Committee.

The amendment to the amendment was agreed to.⁸³

There was no further discussion of 2(f) in the Senate.

The House Bill as passed *did not* contain a provision similar to 2(f). In Conference the House Conferees agreed to accept the Senate provision. The House Conference Report, with respect to 2(f), stated:

Subsection (f) makes it unlawful for any person engaged in commerce knowingly to induce or receive a discrimination in price which is prohibited by this section. This subsection was not contained in the House Bill, but is the same as subsection (f) in the Senate amendment, except that the words "or terms of sale" are eliminated to harmonize with subsection (a).⁸⁴

Congressman Utterback, in his statement on the Conference Bill, stated:

The closing paragraph of the . . . amendment . . . makes equally liable the person who knowingly induces or receives a discrimination in price prohibited by the amendment. This affords a valuable support to the manufacturer in his efforts to abide by the intent and purpose of the bill. It makes it easier for him to resist the demand for sacrificial price cuts coming from mass-buyer customers, since *it enables him to charge them with knowledge of the illegality of the discount, and equal liability for it, by informing them that it is in excess of any differential which his difference in cost would justify as compared with his other customers.*⁸⁵ (Emphasis added.)

⁸³ 80 Cong. Rec. p. 6666.

⁸⁴ H. Rep. 2951, 74th Cong., 2d Sess. p. 8.

⁸⁵ 80 Cong. Rec. 9419.

If anyone knows whether or not a price granted is unlawful, it is the seller. Congressional Utterback's explanation to the House recognizes this fact in stating that the function of 2(f) is to enable the seller to inform the buyer that the price granted is unlawful and thus charge the buyer with equal liability.

APPENDIX B

Rules as to Burden of Proof as Developed by the Courts Do Not Permit Placing on Buyer the Burden of Proving Seller's Cost Justification.

One of the factors which has been relied upon by the courts as determinative of what is convenient, fair and good policy regarding the apportionment of the burden of proof has been stated by Professor Morgan, one of the leading scholars of the law of evidence, as follows:

Doubtless the compelling consideration causing the creation of some presumptions [which shift the burden of going forward with the evidence] is that the facts tending to show the existence or nonexistence of the presumed fact are peculiarly accessible to the party asserting such non-existence.⁸⁶

This was the basis on which Congress rested section 2(b)⁸⁷ and is the basis upon which the courts have justified the placing of the burden on sellers. *Samuel H. Moss v. F. T. C.*, 148 F. 2d 378, 379; *F. T. C. v. Morton Salt*, 334 U. S. 37, 45, 60.

And, indeed, the common law is replete with examples of the application of this rule.

"Thus," says Morgan, "the establishment of the fact of delivery of a chattel in good condition by a bailor to a

⁸⁶ Morgan, 16 So. Cal. L. Rev. 245, 252. Determination as to burden of proof "must always remain a question of policy and fairness based on experience in different situations." *J. M. Robinson, Narter & Co. v. Tuscaloosa Mills*, 183 F. 966, 969.

⁸⁷ See *supra* pp. 63-64, 66.

bailee and the return of the chattel in a damaged condition compels the trier to assume that the damage was caused by the negligence of the bailee."⁸⁸

"Familiar instances of [the above rule]," the Supreme Court has said, "are where persons are prosecuted for doing a business, such, for instance, as selling liquor without a license. It might be extremely difficult for the prosecution in this class of cases to show that the defendant had not the license required, whereas the latter may prove it without the slightest difficulty."⁸⁹

And with reference to the rule of *res ipsa loquitur*, Dean Wigmore said that "the particular force and justice of the rule . . . consists in the circumstance that the chief evidence of the true cause, whether culpable or innocent, is practically accessible to him [defendant] but inaccessible to the injured person."⁹⁰

This is the rule as to burden of proof restated in 2(b). "It [2(b)] is a restatement of existing law. . . . It is the law of this land exactly as it is written there."⁹¹

In *Casey v. United States*, 276 U. S. 413, 418, Mr. Justice Holmes said:

. . . The statute here talks of prima facie evidence but it means only that the burden shall be upon the party found in possession to explain and justify it when accused of the crime that the statute creates.
4 Wigmore, Ev. sec. 2494. It is consistent with all the constitutional protections of accused men to throw on

⁸⁸ 16 So. Cal. L. Rev. 245, 252. This is so even though the ultimate burden of proving negligence is upon the bailor; the reason for the rule being that "the facts in that regard [as to the cause of damage] are within his [bailee's] knowledge." *Kohlsaat v. Parkersburg & Marietta Sand Co.*, 266 F. 283, 285; *Toukins v. Bleakley Transp. Co.*, 40 F. 2d 249; 9 Wigmore on Evidence (3d ed. 1940), Sec. 2508 and authorities there cited.

⁸⁹ *P. S. v. Denver & Rio Grande R. Co.*, 191 U.S. 84, 92.

⁹⁰ 9 Wigmore on Evidence (3d ed. 1940) pp. 382-384. Illustration after illustration of application of this rule in all fields of the law could be cited. See for example, *Clift v. Scott*, 102 F. 2d 725; *Miller v. Lykes Bros. Ripley S. S. Co.*, 98 F. 2d 185, 186; *Mammoth Oil Co. v. U. S.*, 275 U.S. 13, 51, 52.

⁹¹ Congressman Patman, 80 Cong. Rec. 8442. "The real decision is made upon the judicial judgment based upon experience as to what is convenient, fair and good policy. . . ." Morgan, 44 Har. L. Rev. 906, 911.

them the burden of proving facts peculiarly within their knowledge . . . (Emphasis added).

These common law and common sense rules of fairness as to burden of proof have long been applied by the courts in the construction of statutes, even where the act makes no express provisions for such.

For example, seamen are, by federal statute,⁹² given a right of action against a shipowner for failure to provide sufficient quantities of food or food of good quality. The first paragraph of the statute sets up grounds of the cause of action which "shall be shown", i.e., failure to provide sufficient food or food of good quality; the next three paragraphs set forth the specific recovery allowable; and the last paragraph is an exception in the nature of a justification which may be taken advantage of by the ship owner.

Under normal rules of statutory construction it would fall upon the seaman to establish his case by either (1) showing failure of the owner to supply sufficient provisions, or (2) "show that any such provisions" supplied were "bad in quality or unfit for use".

However, it is apparent that if the statute were given such a construction it would be meaningless since all of the evidence, excepting the personal testimony of the seaman (which would be largely opinion), is peculiarly within the knowledge and control of the owner. As stated in one of the early decisions under the statute, *The Emma F. Angell*, 217 F. 311: "The main controversy is over the fact as to whether this vessel was properly provisioned. . . . If this act is not to be enforced, except in that class of cases in which owners and masters admit dereliction of such a duty, the act might as well never have been passed." Therefore, said the court:

Some general rule must be found to afford us a compass by which to steer. That rule is that, when a controversy arises over the provisioning of a ship in accordance with the shipping articles, the owners and masters must carry the burden of meeting the accusation by establishing the fact that the ship was properly

⁹² 30 Stat. 758, 764; 46 U.S.C.A. 665.

*provisioned. This burden they can easily carry. They are within the principle that the litigant who has control of the proofs must produce them. (Emphasis added.)*⁹³

It is submitted that the sound reasoning of the above decision is applicable to this case. Indeed, the very heart of the Robinson-Patman Act will have been given life in vain and the cost justification proviso "might as well never have been passed" if the construction of the statute here urged by the Commission and the court below is adopted. The buyer is absolutely devoid of facts to show his seller's cost justification and he does not have the means to obtain them. An intent to do a vain thing should not be imputed to the Congress.

Just as the courts in construing the seaman statute have refused to nullify the purpose and policy of the statute, so should the court in this case refuse to adopt a construction of the Robinson-Patman Act which is not only contrary to its express terms but one which would destroy the policy and purpose of the act—a construction which would break the substantive policy of the statute (i. e., that price differentials are legal where cost justified) upon a procedural impasse.

The opinion of the Commission in the instant case states that petitioner "made no attempt to show that the price differentials and discriminations induced and received by it

⁹³ The courts have uniformly followed this rule. *The Silver Shell*, 255 F. 340, 341; *Miller v. Lykes Bros.-Ripley S. S. Co.* 98 F. 2d 185, 186.

E. S. v. Denver & Rio Grande Railroad Co., 191 U.S. 84, presented a case wherein, by an Act of Congress, defendant railroad was granted "the right of way over the public domain . . . and the right to take from the public lands adjacent thereto, . . . timber . . . for the construction and repair of its railway and telegraphic line". Defendant cut certain timber from public lands. The United States brought an action of trover alleging that defendant had "converted" the timber. No testimony was offered by either party to show whether the timber cut from the lands by defendant was "required for the construction and repair of its railway and telegraph line" as provided by the statute. On the question of burden of proof, the court held that since "the means of proof as to the purpose for which the timber was cut were peculiarly within the knowledge and control of the defendant, we think the burden of producing evidence to that effect devolved upon it."

made only due allowance for differences in the cost of manufacture, sale or delivery. . . . The inference is that since petitioner failed to produce such evidence, the evidence was harmful to it.

This question has been dealt with in detail by the Supreme Court in *Mammoth Oil Co. v. United States*, 275 U. S. 13, 51, 52. In that case the court considered the resultant implications to be drawn in two distinct situations: first, where a defendant with evidence available to him fails to produce it and, secondly, where a defendant fails to produce evidence because of the impossibility of production through no fault of his own.

The court stated that the failure to produce evidence in the first situation "stands on a different basis" than failure in the second situation, and laid down several rules in precise terms.

First, quoting Lord Mansfield: "It is certainly a maxim that all evidence is to be weighed according to the proof which it was *in the power of one side to have produced, and in the power of the other to have contradicted.*" (Emphasis added.)²⁴

Secondly, where "it is apparent that the accused is so situated that he could offer evidence of all the facts and circumstances as they existed, and show, if such was the truth, that the suspicious circumstances can be accounted for consistently with his innocence, and he fails to offer such proof, the natural conclusion is, that the proof, if produced, instead of rebutting, would tend to sustain the charge."

But, thirdly, this "natural conclusion" that the unproduced evidence "would tend to sustain the charge" *is to be cautiously applied, and only in cases where it is manifest that proofs are in the power of the accused, not accessible to the prosecution.*" (Emphasis added.)²⁵

We submit that these simple rules of fair procedure as developed by the courts and restated by Congress in Sec.

²⁴ See also *Kirby v. Tallmadge*, 160 U. S. 379, 383.

²⁵ Quoted by the Court from the opinion of Chief Justice Shaw "in the celebrated case of *Com. v. Webster*, 5 Cush. 295, 316, 52 Am. Dec. 711."

tion 2(b) govern this case and require this Court to reject the interpretation of the Court of Appeals:

The proof with reference to the sellers' cost justification is not within "the power" of petitioner to produce.

APPENDIX C

Excerpts from "Accounting as an Aid to Compliance with the Robinson-Patman Act" by William Edgar Thomas, Jr., Urbana, Illinois, 1944,⁹⁶ showing the difficulties involved, even in the case of a seller, in preparing cost studies under the Robinson-Patman Act:

Pages 6-8:

Specifically the law provides, "that nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such persons sold or delivered." It is about this justification that the thesis is written primarily; it is to indicate the possibilities of accounting as an aid to management in the establishment of the maximum allowable price differential for a customer under this section of the law.

The accountant who has been assigned the task of analyzing distribution costs for the purpose of supporting price differentials already given or to prepare a discount schedule will find that much of the work done in making analyses for management is unsuitable, and that analysis must be carried farther than is generally done for management. In general, the analyses made for management are for the purpose of aiding in the determination of what to sell, where to sell, how to sell, and to whom to sell, and in the elimination of non-productive costs. Thus, managerial analyses are

⁹⁶ An abstract of a Thesis submitted in partial fulfillment of the requirements for the Degree of Doctor of Philosophy in Accountancy in the Graduate School of the University of Illinois, 1942.

generally analyses by products, by territories, by channels of distribution, and by customers. The analysis for the determination of legitimate price differentials must be to discover the difference in the cost of manufacturing, sale, and delivery of goods of like grade and quality to competing customers. It must demonstrate the cost of distributing a unit of product to each of two customers in the same competitive area, and, thus, must be carried one step farther than either the managerial analysis for products or the managerial analysis for customers. Further, a different approach may be used for the two analyses. If management is confronted with the problem of whether to add a product, a territory, or class of customers, an analysis on the basis of differential or marginal costs will be invaluable. An analysis based on the marginal or differential cost approach would be entirely unsuitable for the purpose of justifying price differentials because of the apparent intention of the framers of the Act not to allow marginal costs as a basis for justification for price differentials.

The accountant who must establish legal price differentials has a difficult task. While the law states that the justification rests upon differences in cost, there is no precise definition of the costs which may or may not be included in the computations. The accountant will find little help in a study of the few cases which have been settled or in a study of the Congressional Record. A positive statement is made in the H. C. Brill case by the Commission in explaining that the cost of selling, credit, ordering, shipping, advertising, and other elements can be considered as producing a differential in cost. A definition of the functions mentioned is not made, and "other elements" is, of course, rather vague. In any case, the accountant will include or exclude the cost on the basis of his ability to demonstrate a causal relationship between the cost and the allocation unit which is the product-customer. At one extreme are costs which unquestionably may be included because they can be traced definitely to the product sold to the customer. An example would be

freight out. At the other extreme are costs which will probably be excluded in most cases because of the difficulty or impossibility of expressing and proving even an indirect relationship between the cost and the unit of the product-customer. Examples of this type are the cost of public relations work, and the directors' fees. While the accountant should be in a position to prove that a relationship does exist between the cost and the product-customer, the measurement of the relationship does not have to be specific and precise, but may be accepted by the Federal Trade Commission if it is reasonable.

The justification for price differentials may be found in manufacturing costs or distribution costs. It is generally agreed by commentators that there can be no difference in cost which will justify a price differential if manufacturing is for stock.

Pages 8-12:

In analyzing distribution costs to discover cost differences for the justification of price differentials, the first step for the accountant is to define the functions and sub-functions of the distributive activities of the company. The second step is to find the cost of carrying out each sub-function. This cost is the total of the portions of the primary costs which apply to the sub-function, and while they vary from sub-function to sub-function, they may include such items as wages and salaries, supplies, heat, light, insurance, taxes, depreciation, and maintenance. If the study is being made to substantiate price differentials already given, the costs used should be those incurred in the period in which the price differentials were given, but if the analysis is to be used for the construction of a discount schedule the costs used should be those budgeted for the period in which the schedules are to be used. When the sub-function cost has been ascertained, the next step is to allocate that cost to the allocation unit, which is the product-customer. The basis chosen should be an expression of the causal relationship between the sub-

function cost and the allocation unit, and should, in all cases possible, be an objective measurement.

On a subject as complex as distribution, it is impossible to consider all possible cases which may require modifications of general statements. With this in mind, a list of distribution sub-functions are given (see chart, pages 16-22) with their bases of allocation to the allocation unit. The sub-function is listed first, next, the order of the allocation (that is, whether the cost is allocated first to the customer and then to the product, or first to the product and then to the customer), then the basis for making the first allocation, and finally the basis for making the second allocation.

The bases in the chart are familiar to the reader or are self-explanatory, except one. The basis is expressed as the proportionate mileage or the relative distance to each customer, and is used for the portions of salesmen's traveling costs and delivery costs, which vary with the factor of mileage. Since these costs are incurred in proportion to the mileage to be traveled to reach customers it is thought that mileage is the best basis for an allocation. If a terminal is used, for example, a warehouse for deliveries or a sales office for salesmen, the amount of mileage cost to cover his circuit which is to be allocated to a customer is the percentage of the distance which that customer is from the terminal of the total distance of all customers on that circuit from the terminal. The distance to each customer should be taken as the shortest practicable route for the salesman or delivery truck from the terminal to the customer. If the salesman does not operate from a terminal, a possible solution is to establish a base point for the measurement of distances. The base point should be established by plotting all customers on a map and averaging their distances from an X axis and from a Y axis.

Work to be done by the accountant in connection with the Robinson-Patman Act may be either an attempt to justify price differentials which have already been given by the company or to aid in the construction of price schedules so that no unjustifiable price differ-

tials will be given. If he is charged with the former he will carry out the steps outlined above, allocating the costs incurred in the period in which the alleged discrimination took place to the customers involved and to the products which they purchased. Of course, only the costs of the sub-functions which are used in serving the customer should be allocated to him. When the total cost of selling a product to a customer has been determined it can be reduced to a unit cost so the unit costs of the customers involved in the alleged discrimination can be compared.

A more positive approach is to establish price schedules which are legal, so there will be no possibility of a violation of the Robinson-Patman Act. The price schedules which the accountant may aid in constructing are the straight quantity discount, the cumulative discount, and the trade or functional discount. In addition to the preparation of discount schedules for use by various classes of customers, the accountant may be asked to determine the amount of the justifiable price discrimination for goods sold to one specific customer.

The accountant in building up a straight quantity discount schedule should go through the following steps: (1) a critical survey of all manufacturing and distribution costs, (2) the determination of costs which may be considered costs of manufacturing, selling, and delivery within the meaning of the Robinson-Patman Act, (3) the determination of the proper basis (if one can be found) for allocating each cost to the allocation unit which is the customer-product, (4) a classification of customers, i.e., a definition of the class of customer which is to use the discount schedule, (5) the determination of the costs listed in number 2 which may be included in the scheduled computation when the class of customer is considered, (6) the allocation of the costs chosen in step number 5 to a cost for each order, then the study of the variations of each cost with variations in the quantity of goods ordered and delivered, (7) the fixing of the brackets at points of break in the total cost curve for increasing quantities of goods ordered and delivered, (8) the conversion of

the cost differences between brackets to a percentage of the base selling price because price schedules are customarily set up as percentages of a list price.

Steps one, two, and three require no comment here beyond what has already been mentioned in this summary. The fourth step is to define the type or class of customer to use the schedule. This must be done in a precise manner, for the inclusion of many of the costs in the computation of the cost differential depends upon the type of customer, the way in which he orders, the method in which goods are delivered to him, the way in which he pays for the goods, and, in general, the relationship between the customer and the vendor. The fifth step is to survey the costs listed in step number two and eliminate all which do not meet a requirement. That requirement is that the cost must not be allocable to the customer-product on the basis of a customer characteristic, except such customer characteristics which are *uniform* for all customers who are to use the discount schedule. Examples of the characteristics of a customer are his distance from the warehouse, his habit of ordering by mail or through a salesman, and his habit of paying cash or buying on account. To include costs which are not constant for each customer for each quantity would mean that they would have to be included as an average. The resulting price schedule would then reflect the differences in the cost of selling different quantities to *average* customers. Discrimination is between *real* customers and the test of differentials may be made on the basis of the cost to sell to *real* customers. If the real customers vary in any way from the average which was the basis for their price differentials, the test will show unjustified price differentials. A uniformity of customer characteristics will eliminate this possibility.

The sixth step is to study the action of the cost for an order when the quantity of the order fluctuates. A separate study of this type should be made for each sub-function cost which is to be included in the computation of price differentials for the particular schedule being prepared. The sub-function cost curves for vary-

ing quantities should then be combined to find the total cost curve for varying quantities of goods.

The seventh step is to break the cost curve into segments to establish quantity brackets. The points at which division should be made are the points of significant change in the cost curve for each sub-function. If the cost curve is a smooth one the division will have to be an arbitrary one. Then the points established for all of the curves should be summarized to give the points on the total curve. If many breaks occur close together they probably should be combined in order to reduce the number of brackets. The adjustment will be made on the basis of the relative significance of the two costs giving rise to the breaks. If a pattern of the volume of orders has been established, the brackets should be set so that the greatest volume of orders for that approximate quantity will be centered in the bracket. In addition, the brackets should not be so large as to include unlike types of business such as "nuisance business" and regular orders from small dealers, or to make very important discrimination for each unit between the purchaser of the greater number of units in one bracket and the purchaser of the smallest number of units in the next larger bracket, nor should the brackets be so small as to, in effect, make the discount available to one or a few customers only.

The final step in the construction of the quantity discount schedule is to find the percentages for the brackets of the schedule. The units of goods sold in the lowest bracket will be at list price. The discount for each bracket can be found by dividing the difference between the average unit cost in that bracket and the average unit cost in the lowest bracket by the list price.

Pages 12-13:

A most important part of the preparation of the functional discount schedule is the classification of customers. The old classification of customer's as manufacturer, wholesaler, retailer, and consumer is no longer

satisfactory because of the growing complexity of the system of distribution. The discount schedules are to be based upon cost differences which, in turn, vary with functions performed for customers. Therefore, the classification of customers must be based upon the functions which are performed for those customers. The functions performed for any group of customers using one discount schedule should be homogeneous, at least so far as costs included in the schedule computation are concerned.

The general rules for the preparation of straight discount schedules must also be followed in preparing a functional quantity discount schedule. Each functional discount schedule must reflect cost differences arising from the assumption of functions by the class of customers using that schedule. Not only should there be a cost relationship between the various quantity brackets on the schedule, but there must in addition be a definite cost relationship between the schedules used by the various classes of customers. Thus, the difference in price to any one customer must be accounted for by differences in cost arising either from differences in quantity of goods sold to the customer or from the cost of functions assumed by the purchaser. In the general preparation of discount schedules, all costs which might be legitimately included as supporting a cost difference are studied critically, and the changes in the cost of an order resulting from changing quantities ordered are studied and set up in tables or graphs. This procedure is followed for each sub-functional cost. To find the justifiable price differential between classes of customers it is necessary to combine the tables of cost of the sub-functions which the one class assumes as compared with the other. A comparison of the two tables will show the justifiable discrimination between the two classes for any quantity of goods. The discounts within each schedule should be determined solely on the basis of differences in cost resulting from differences in the quantity of goods sold on each order.

ALLOCATION OF COSTS FOR THE JUSTIFICATION OF PRICE DIFFERENTIALS

(See page 9 for explanation of chart.)

<i>Expenses</i>	<i>Order of Allocation</i>	<i>Basis of First Allocation</i>	<i>Basis of Second Allocation</i>
1. Sales traveling costs (which vary with mileage).	Customer-product.	Proportionate mileage on circuit.	All salesman solicitation cost already allocated to customer may be allocated to products: (1) order taking time—basis of number of lines; (2) promotion—basis of total possible sales to the customer (based on merchandise sold by customer).
2. Sales traveling costs (which vary with time).	Customer-product.	(a) Time on road—proportionate time required to reach each customer. (b) Time at stop direct to customer.	
3. Salesman's salary:			
(a) Salary relating to time to reach customers.	Customer-product.	Proportionate time required to reach each customer.	Same as 1, above.
(b) Salary for time spent interviewing customer.	Customer-product.	Direct to customer.	Same as 1, above.
4. Sales commissions and bonus:			
(a) Time spent in traveling.	Customer-product.	Proportionate time required to reach each customer.	Same as 1, above.
(b) Time spent in selling.	Customer-product.	Direct to customer.	Same as 1, above.
5. Salesman's living expenses:			
(a) Living expenses multiplied by stop time, divided by total working time.	Customer-product.	Direct to customer.	Same as 1, above.
(b) Living expenses multiplied by travel time, divided by total working time.	Customer-product.	Relative distance to customer.	Same as 1, above.

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<i>Expenses</i>	<i>Order of Allocation</i>	<i>Basis of First Allocation</i>	<i>Basis of Second Allocation</i>
6. Salesman's supervision: Allocated to each salesman on basis of unit costs for checking reports, sending out form letters, and other routine work. Time reports for other types of supervision. Then allocate to: Those supervision costs facilitating travel, e.g., routing. Supervision costs aiding salesman's presentation e.g., cost of sales manual.			
	Customer-product.	Relative distance to each customer.	Same as 1, above.
	Customer-product.	Time spent interviewing customers.	Same as 1, above.
7. Telephone costs incurred by salesmen in the field.	Customer-product.	Direct to customer.	Direct to the product, if possible. If a service call or a catalog, allocation on the basis of the total possible sales to the customer (based on merchandise sold by the customer).
8. Telephone solicitation from sales office.	Customer-product.	Functional unit cost plus toll charges direct to customer.	Same as 7, above.
9. Taking orders by telephone.	Customer-product.	Functional unit cost direct to customer plus toll charges direct to customer.	Same as 7, above.
10. Solicitation by mail, pamphlets, price lists, catalogs, etc.	Customer-product.	Cost per piece (which may vary with the type of piece mailed) plus mailing costs—direct to customer.	Same as 7, above.
11. Delivery by rail.	Customer-product.	Direct, on basis of published tariffs.	Direct.
12. Delivery by common carrier (truck).	Customer-product.	Direct, on basis of charges or published tariffs.	Direct.

<i>Expenses</i>	<i>Order of Allocation</i>	<i>Basis of First Allocation</i>	<i>Basis of Second Allocation</i>
13. Delivery by company owned trucks (including all costs):			
(a) Mileage costs.	Customer-product.	Basis of relative distance to reach each customer from distribution point.	(1) Weight or bulk, or (2) do not allocate.
(b) Time costs:			
(1) Travel time.	Customer-product.	Relative time required to reach each customer from distribution point.	(1) Weight or bulk, or (2) do not allocate
(2) Stop or unload time.	Customer-product.	Direct to customer.	Standard handling unit, per case, per pound, depending upon type of merchandise unloaded. Relative weight of the products delivered to the customer.
(c) Load cost.	Customer-product.	Relative ton-miles of goods delivered to each customer on the route as computed from the distribution point.	
14. Mailing department costs: a service department, and its costs are allocated to other functions:			
15. Invoice cost (standard costs developed for each operation below):			
Arranging material for typing.	Not included in analysis.		
Inserting invoices.	Not included in analysis.		
Typing heading and shipping instructions.	Not included in analysis.		
Typing one line and extending.	Standard cost direct to customer-product.		
Proof of extension and total.	Standard cost direct to customer-product.		
Proof of weight and total.	Standard cost direct to customer-product.		
Removing invoices.	Not included in analysis.		
Assembling orders.	Not included in analysis.		
Marking production report.	Not included in analysis.		

<i>Expenses</i>	<i>Order of Allocation</i>	<i>Basis of First Allocation</i>	<i>Basis of Second Allocation</i>
16. Accounts receivable (itemized): Actual or standard unit costs are found for each of the following:			
Sorting (orders, etc.).	Customer-product.	The order or voucher sorted.	Per item sorted.
Predetermined total.	Customer-product.	The posting media.	Per item of goods added and listed.
"Stuffing" ledger.	Customer-product.	The number of times the account has been posted.	Not allocated because it is a joint cost, or sales value.
Posting.	Customer-product.	The posting.	Per item for goods posted (posting of purchase returns and allowances).
Checking predetermined totals.	Not allocated
17. Accounts receivable (not itemized).			
Sorting posting media.	Customer-product.	Item of posting media sorted.	Item of posting media sorted.
Predetermined total.	Customer-product.	Item of posting media listed.	Item of posting media relating to the product listed.
"Stuffing" ledger.	Customer-product.	The number of times the account has been "stuffed."	Not allocated, or sales value.
Posting.	Customer-product.	The posting.	(A joint cost of all goods). Not allocated, or sales value.
Checking predetermined total.	Not allocated.

<i>Expenses</i>	<i>Order of Allocation</i>	<i>Basis of First Allocation</i>	<i>Basis of Second Allocation</i>
18. Monthly statements: Allocation same as for accounts receivable. Cost of mailing the statement.	Customer-product.	Functional cost to mail a letter and number of letters mailed to customer.	Sales value, or omit.
19. Collection costs routine:			
(a) Receiving, opening, and sorting remittances.	Customer-product.	Mailing room unit costs for operations performed for the customer.	Sales value.
(b) Listing remittances.	Customer-product.	The number of remittances.	Sales value.
(c) Preparation of cash vouchers to be used for posting.	Customer-product.	The number of remittances.	Sales value.
(d) Verification of remittances.	Customer-product.	The number of remittances.	Sales value.
20. Collection costs, special attention:			
(a) Checking accounts receivable for past due accounts.	Customer-product.	The accounts checked.	Sales value.
(b) Preparation of form letters and maintenance of files.	Customer-product.	The letter mailed.	Sales value.
(c) Mailing of form letters to customers at regular intervals.	Customer-product.	Mailing room unit costs for operations performed for the customer.	Sales value.
(d) Dictation and typing of special letters.	Customer-product.	Dictation and typing unit costs for operations performed for the customer.	Sales value.
(e) Collectors' services.	Customer-product.	Direct charge on time.	Sales value.
21. C.O.D. costs.	Customer-product.	Direct.	Direct (use schedule of charges, assuming that each product was shipped separately), or omit from analysis.
22. Bad debts expense.	Customer-product.	Credit rating.	Sales value.
23. Dictation and typing:			
(a) Dictation.	Customer-product.	Rate for grade of dictation \times amount for the customer.	Amount relating to the product.
(b) Typing.	Customer-product.	Rate for grade of typing \times amount for the customer.	Amount relating to the product.

<i>Expenses</i>	<i>Order of Allocation</i>	<i>Basis of First Allocation</i>	<i>Basis of Second Allocation</i>
24. Storage costs (goods carried in stock):			
(a) Labor and equipment cost of placing goods in storage.	Product-customer.	Direct, on time, or standard handling unit basis.	Direct, on unit basis.
(b) Storage-occupancy costs.	Product-customer.	Space occupied and length of time in storage. Length of time is a seasonal average.	Direct.
25. Storage costs of goods produced on special order.	Direct to customer-product, on basis of actual space and length of time in storage.		
26. Order filling:			
(a) Clerical:			
(1) Receipt of order.	Discussed elsewhere.		
(2) Approval of credit.	Discussed elsewhere.		
(3) Preparation of routine forms to be used in the packing department, shipping room, follow-up file, etc.	Discussed elsewhere.		
(4) Credit to the stock records.	Direct to customer-product on basis of invoice item.		
(5) Pricing of records.	Direct to customer-product on basis of invoice item.		
(6) Invoice preparations.	Discussed elsewhere.		
(7) Posting to accounts receivable.	Discussed elsewhere.		
(b) Order assembly. Time studies set standard costs for obtaining quantities of goods from stock:			
(1) Counting and handling units.	Direct to customer-product by use of standard costs.		
(2) Trips from bin to assembly point.	Direct to customer-product by use of standard costs.		
(c) Packing standards to be set for packing various quantities of product for shipments by various methods.	Direct to customer-product by use of standard costs.		

Expenses

Order of Allocation

Basis of First Allocation

Basis of Second Allocation

27. Manufacturing cost:

(a) If manufacturing for stock.

Do not allocate.

(b) If manufacturing on special order:

(1) Material:

Materials if purchased definitely for the order. Receiving and purchasing department costs.

Direct to customer-product.

Direct to customer-product on basis of sub-functional unit costs multiplied by number of units performed for the customer.

(2) Labor:

Overtime:

If during rush season.

If a rush job results in working overtime to get back on schedule.

Allocate to all jobs on basis of labor hours.

Allocate entire overtime to the rush job.

Set-up costs.

Allocate entirely and directly to the job.

(3) Overhead.

Do not allocate.